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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886

No. 859. ~~514~~ 233

ALEXANDER B. McKINLEY, PLAINTIFF IN ERROR,

vs.

JEROME B. WHEELER, AND CLINTON MARKELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED MARCH 17, 1886.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Dever.

Be it remembered that heretofore and on, to wit, the 31st day of July, A. D. 1885, came Hugh Butler, Esq., and T. D. W. Yonley, Esq., attorneys of record in said court, and filed in said court a complaint and sued out of said court a writ of summons, in a certain cause wherein Alexander B. McKinley was plaintiff and Jerome B. Wheeler and Clinton Markell were defendants.

And the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States in and for the District of Colorado.

ALEXANDER B. MCKINLEY, Plaintiff,

vs.

JEROME B. WHEELER and CLINTON MARKELL, Defendants.

The plaintiff complains of the defendants, Jerome B. Wheeler and Clinton Markell, and for cause of action alleges:

I.

2 That the plaintiff is a citizen of the State of Colorado, and that the defendant, Jerome B. Wheeler, is a citizen of the State of New York, and the defendant, Clinton Markell, is a citizen of the State of Minnesota.

II.

That the value of the interest in the premises here sued for in this action and the matter in dispute herein, exclusive of costs, exceeds the sum or value of $5,000.

III.

That on, to wit, the 11th day of March, A. D. 1884, and ever since hitherto, the plaintiff was and is the owner of an undivided one-half (½) part and interest of and in the Vallejo lode and mining claim, 1,500 feet in length by 300 feet in width, situate in Roaring Forks mining district, Pitkin county, and State of Colorado, and on said day was in possession, and ever since has been, and is now, entitled to the possession thereof.

IV.

That he claims the right to occupy and possess said premises by virtue of a full compliance with the local laws and rules of miners in said mining district, the laws of the United States, and of the State of Colorado, by himself and his grantors, as an interest in a

lode mining claim duly located on the public domain of the United States, to wit, as an undivided one-half (½) part and interest of and in the said Vallejo lode and mining claim as discovered and located by the Josephine Mining and Prospecting Company, James W. McGee, and Charles Miller, by purchase by virtue of conveyance from the said The Josephine Mining and Prospecting Company.

3

V.

That the said Vallejo lode and mining claim is described by metes and bounds as follows:

"Beginning at corner No. 1, southeast corner post of claim; thence south 45 degrees W. seven hundred and fifty (750) feet to post No. 2, center S. side line post of claim, and continued course fifteen hundred (1,500) feet to post No. 3, southwest corner of claim, whence bear to confluence of Hunter's creek and Roaring Forks river N. 9 degrees W., and to high point on Independence range N. 87 degrees E.; thence S. 45 degrees W. three hundred (300) feet to post No. 4, northwest corner post of claim, whence bear to confluence of Hunter's creek and Roaring Forks river N. 10 degrees 48′ W. and to high point on Independence range N. 89 degrees E.; thence N. 45 degrees E. seven hundred and fifty (750) feet to post No. 5 center N. side line of claim, and continued course fifteen hundred (1,500) feet to post No. 6, northeast corner post of claim; thence S. 45 degrees E. three hundred (300) feet to post No. 1, the place of beginning. Variation, 15 degrees E.

"The discovery shaft of said claim is situate on the northeastern slope of Aspen mountain. The said lode was located on the 20th day of June, 1880."

VI.

That on, to wit, the twentieth day of October, A. D. 1884, the defendants entered upon the said premises hereinbefore mentioned and described, and on said day wrongfully and unlawfully excluded the plaintiff from the possession thereof and every part thereof, and ever since have, and still have, the possession of said premises, and since said date have wrongfully and unlawfully excluded, and still

4 do wrongfully and unlawfully exclude, the plaintiff from the possession of said premises and every part thereof.

For a second cause of action the plaintiff complains and alleges:

I.

That the plaintiff is a citizen of the State of Colorado, and that the defendant, Jerome B. Wheeler, is a citizen of the State of New York, and the defendant, Clinton Markell, is a citizen of the State of Minnesota.

II.

That the value of the interest in the premises here sued for in this action and the matter in dispute herein, exclusive of costs, exceeds the sum or value of $5,000.

III.

That on, to wit, the 11th day of March, A. D. 1884, and ever since hitherto, the plaintiff was and is the owner of an undivided one-half (½) part and interest of and in the Vallejo lode and mining claim, 1,500 feet in length by 300 feet in width, situated in Roaring Forks mining district, Pitkin county, and State of Colorado, and on said day was in possession, and ever since has been, and is now, entitled to the possession thereof.

IV.

That he claims the right to occupy and possess said premises by virtue of a full compliance with the local laws and rules of miners of said mining district, the laws of the United States and of the State of Colorado, by himself and his grantors, as an interest in a lode mining claim duly located on the public domain of the United States; that said Vallejo lode and mining claim was on or before the 20th day of June, A. D. 1880, discovered by the Josephine Mining and Prospecting Company, James W. McGee, and Charles W. E. Miller, who afterwards, to wit, on or about the 11th day of August, A. D. 1880, duly located and staked the same as a lode mining claim and recorded the location certificate thereof in the office of the clerk and recorder in the county in which the said premises were situate; that thereafter, to wit, on the 11th day of October, A. D. 1884, George H. Hewitt and the defendants having then become the owners of a certain undivided interest in the said Vallejo lode and mining claim did, for the purpose of further description and without waiver of any previous rights, cause a further record of said Vallejo lode mining claim to be made and filed for record in the county in which said premises are situate, wherein and whereby said lode is described by metes and bounds as follows, to wit:

"Beginning at corner No. 1, a substantial post, whence cor. 1, 3650, Steele lode, bears S. 37 degrees 20′ E. 61.5 feet; thence S. 47 degrees 59′ E. 336 feet to cor. No. 2, a substantial post; thence N. 76 degrees 35′ E. 686.52 feet to south-side center stake and 1,373.05 feet to cor. No. 3, a substantial post, whence a pine stump 10″ dia. 2′ high bears S. 82 degrees 30′ E. 6.5 feet east, end of Red mountain, bears N. 17 degrees 55′ E., a prominent rock on West Aspen Mt., bears N. 45 degrees 18′ W.; thence N. 47 degrees 59′ W. 350.5 feet to cor. No. 4, a substantial post, whence an aspen stump 11″ dia., 5 feet high, bears S. 39 degrees 15′ W. 13.1 feet, an aspen stump 12″ dia., 3 feet high, bears N. 69 degrees 10′ W. 20.8 feet east, end of Red Mt., bears N. 19 degrees 35′ E.; thence S. 76 degrees 05′ W. 682.4 feet to north side center stake and 1,364.8 feet to cor. No. 1—place of beginning; variation, 14 degrees 45′ E.; this being the same lode originally located on the 20th day of June, 1880."

V.

That on, to wit, the 20th day of October, A. D. 1884, the defendants entered upon the premises hereinbefore mentioned and described,

and on said day wrongfully and unlawfully excluded the plaintiff from the possession thereof and every part thereof, and ever since have had and still have the possession of the said premises, and since said date have wrongfully and unlawfully excluded, and still do wrongfully and unlawfully exclude, the plaintiff from the possession of said premises and every part thereof.

Wherefore plaintiff prays judgment against defendants—

I.

For the recovery of the possession of an undivided one-half (½) in-interest in said Vallejo lode and mining claim, as described in said first cause of action.

II.

For the recovery of the possession of an undivided one-half (½) interest in said Vallejo lode and mining claim, as described in said second cause of action.

III.

For the sum of $1,000 damages and for costs of suit.

(S'g'd) HUGH BUTLER,
T. D. W. YONLEY,
Attorneys for Plaintiff.

7 (Endorsed:) 1784. In the circuit court of the United States for the district of Colorado. Alexander B. McKinley, plaintiff, *vs.* Jerome B. Wheeler and Clinton Markell, defendants. Complaint. Filed Jul. 31, 1885. (S'g'd) Edward F. Bishop, clerk. Hugh Butler, T. D. W. Yonley, attorneys for plaintiff.

And the said writ of summons, together with the return of service thereon by the marshal, is in words and figures as follows, to wit:

8 *Summons.*

In the Circuit Court of the United States for the District of Colorado.

ALEXANDER B. MCKINLEY, Plaintiff,
versus
JEROME B. WHEELER and CLINTON MARKELL, Defendant.

Complaint. Filed in the clerk's office this 31st day of July, A. D. 1885.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States of America to Jerome B. Wheeler and Clinton Markell, Greeting:

You and each of you are hereby notified that an action has been brought in said court by Alexander B. McKinley, plaintiff, against

you as defendants to recover the possession of certain real property situate in Roaring Forks mining district, Pitkin county, and State of Colorado, to wit: an undivided ½ interest in the Vallejo lode and mining claim, together with the sum of $1,000.00 damages, and for the costs of this suit, as more fully set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe, otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 31st day of July, A. D. 1885, and of the Independence of the United States the 110th year.

[Seal U. S. Cir. C't, Colorado.]

(Signed) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

8½ *Proof of Service.*

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

DENVER, *Aug't* 17, A. D. 1885.

I hereby certify that I received the within writ on the 31st day of July, A. D. 1885, and that I have personally served the same upon the said defendant, Clinton Markell, by delivering to him personally a true copy of the within writ at the time and place as follows: As to —— ——, at Denver, county of Arapahoe, on the 31st day of July, A. D. 1885; as to Jerome B. Wheeler, not found.

This writ therefore returned partly executed, as the law directs, this 17th day of August, A. D. 1885, per order of plaintiff.

(S'g'd) WALTER A. SMITH, *Marshal*,
By SIM. W. CANTRIL,
Deputy Marshal.

[Endorsed:] Gen. No. 1784. Circuit court of the United States for the district of Colorado. Alexander B. McKinley, plaintiff, *versus* Jerome B. Wheeler *et al.*, defendant-. Summons. Filed this 17th day of August, A. D. 1885. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Hugh Butler [and] T. D. W. Yonley, of Denver, attorneys for plaintiff.

9 And afterwards, and on, to wit, the 13th day of August, A. D. 1885, came the said defendants, by C. S. Thomas, Esq., their attorney, and filed in said court and in said cause their demurrer to the complaint herein.

And the said demurrer to the complaint is in words and figures as follows, to wit:

Demurrer.

In the Circuit Court of Eighth Judical Circuit in and for said District.

ALEXANDER B. McKINLEY
vs.
JEROME B. WHEELER *et al.* } No. 1784.

UNITED STATES OF AMERICA,
District of Colorado, } ss:

The defendants now come and demur to the complaint of the plaintiff, and say that the same does not state facts sufficient to constitute a cause of action:

First. Because the said complaint does not state the nature of the plaintiff's estate in the premises, as required by statute.

Second. Because the complaint does not state that the plain-
10 tiff was or is entitled to the possession of the premises at the time of commencement of the action or any part thereof, as required by statute.

Third. Because the said complaint does not state or allege any facts of discovery, location, or possession of any mining claim, as required by law.

Fourth. Because the said action appears to be brought by the plaintiff as a tenant in common against his cotenants.

Fifth. Because the plaintiff bases his title or claim of ownership to an undivided one-half of the said Vallejo lode mining claim upon a purchase and conveyance thereof from the Josephine Mining Company, a locator of said claim, and that said company, whether a corporation or partnership, was and is incapable of originally locating a mining claim, in whole or in part, under the statutes of the United States or of the State of Colorado.

Sixth. And for other good and sufficient reasons appearing upon the face of said complaint.

(S'g'd) By PATTERSON & THOMAS,
DOWNING & FRANKLIN,
Att'ys for Defendants.

(Endorsed:) 1784. U. S. circuit court district of Colorado. Alexander B. McKinley *vs.* Jerome B. Wheeler *et al.* Demurrer to complaint. Filed Aug. 13, 1885. (S'g'd) Edward F. Bishop, clerk. Patterson & Thomas & Downing & Franklin, def'ts' att'ys.

11 And afterwards, and on, to wit, the 4th day of January, A. D. 1886, the same being one of the regular juridical days of the October term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Demurrer Sustained.

ALEXANDER B. McKINLEY
vs.
JEROME B. WHEELER and CLINTON MARKELL. } 1784.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by Hugh Butler, Esq., his attorney, and the said defendants, by T. H. Patterson, Esq., their attorney, also come.

And the demurrer of the said defendants to the complaint herein having heretofore come on to be heard, and having been submitted to the court and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said complaint is not sufficient in law, and so the said demurrer is sustained.

And afterwards, and on, to wit, the 12th day of January, A. D. 1886, the same being one of the regular juridical days of the October term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and
12 entered of record in said court and in said cause, to wit:

Order. Judgment for Defendants.

ALEXANDER B. McKINLEY
vs.
JEROME B. WHEELER and CLINTON MARKELL. } 1784.

Action for possession of specific real property and for damages.

At this day come the said defendants, by C. S. Thomas, Esq., their attorney, and move the court for judgment herein, and the demurrer of the said defendants to the complaint herein having heretofore been sustained:

Therefore, it is considered by the court that this cause be dismissed; that the said defendants go hence hereof without day, and have and recover of and from the said plaintiff their costs by them in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards, and on, to wit, the 18th day of January, A. D. 1886, the same being one of the regular juridical days of the October term, A. D. 1885, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order Vacating Judgment. Leave to Amend Complaint.

13 ALEXANDER B. McKINLEY
vs.
JEROME B. WHEELER and CLINTON MARKELL. } 1784.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff in his own proper person, and the said defendants, by C. S. Thomas, Esq., their attorney, also come.

And thereupon the said plaintiff, here in open court, moves the court to vacate the judgment lately and on the 12th instant had herein and for leave to amend his complaint. And the court being now sufficiently advised in the premises it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be granted.

Wherefore it is ordered that the judgment lately and on the 12th instant entered herein be vacated and for naught held, and that the said plaintiff have leave to amend his complaint herein within two (2) days from this day, as he shall be advised.

And afterwards, and on, to wit, the 20th day of January, A. D. 1886, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause an amended complaint.

And the said amended complaint is in words and figures as follows, to wit:

14 *Amended Complaint.*

In the Circuit Court of the United States in and for the District of Colorado.

ALEXANDER B. McKINLEY, Plaintiff,
vs.
JEROME B. WHEELER and CLINTON MARKELL, Defendants.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss.*

The plaintiff for an amended complaint complains of the defendants, Jerome B. Wheeler and Clinton Markell, and for cause of action alleges:

I.

That the plaintiff is a citizen of the State of Colorado, and that the defendant, Jerome B. Wheeler, is a citizen of the State of New York, and the defendant, Clinton Markell, is a citizen of the State of Minnesota.

II.

That the value of the interest and the premises here sued for in this action and the matter in dispute herein, exclusive of costs, exceeds the sum or value of $5,000.

15

III.

That on, to wit, the 11th day of March, A. D. 1884, and ever since hitherto, the plaintiff was and is the owner of an undivided one-half (½) part and interest of and in the Vallejo lode and mining claim, 1,500 feet in length by 300 feet in width, situate in Roaring Forks mining district, Pitkin county and State of Colorado, and on said day was in possession, and ever since has been, and is now, entitled to the possession thereof.

IV.

That he claims the right to occupy and possess said premises by virtue of a full compliance with the local laws and rules of miners in said mining district, the laws of the United States, and of the State of Colorado, by himself and his grantor, as an interest in a lode mining claim duly located on the public domain of the United States, to wit, as an undivided one-half (½) part and interest of and in the said Vallejo lode and mining claim, as discovered and located by the Josephine Mining and Prospecting Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, James W. McGee, and Charles Miller, by purchase and by virtue of conveyance from the said The Josephine Mining and Prospecting Company.

V.

That the said the Josephine Mining and Prospecting Company, the grantor of plaintiff and one of the locators of said lode mining claim as aforesaid, was, at the time of the said location of

16 said lode mining claim, a corporation duly organized and existing under and by virtue of the laws of the State of Colorado for the purpose and object of prospecting for valuable mineral deposits on the public domain of the United States within said State and of mining valuable minerals in said State.

That each and all of the incorporators of said corporation, and each and all of the members thereof, at the time of the location, were citizens of the United States of America, severally and individually qualified and competent to enter upon the public domain of the United States and acquire title to the public mineral lands by discovery and location, as provided by act of Congress, and said corporation did, by and through its agent, the superintendent of said company, enter upon the public mineral domain of the United States, and, together with the said McGee and Miller, discover and locate the said Vallejo lode mining claim, the said location being made in the name of Miller, McGee, and the Josephine Mining and Prospecting Company, the discovery and location being for the use and benefit of, to wit, Miller and McGee, one-half, and the members of said corporation one-half.

VI.

That the said Vallejo lode and mining claim is described by metes and bounds as follows:

"Beginning at corner No. 1, southeast corner post of claim; thence south 45 degrees W. seven hundred and fifty (750) feet to post No. 2 center S. side line post of claim and continued course fifteen hundred (1,500) feet to post No. 3, southwest corner post of claim, whence bear to confluence of Hunter's Creek and Roaring Forks river N. 9 degrees W., and to high point on Independence range N.
17 87 degrees E.; thence S. 45 degrees W. three hundred (300) feet to post No. 4, northwest corner post of claim; whence bear to confluence of Hunter's creek and Roaring Forks river N. 10 degrees 48′ W., and to a high point on Independence range N. 89 degrees; thence N. 45 degrees E. seven hundred and fifty (750) feet to post No. 5, center N. side line of claim, and continued course fifteen hundred (1,500) feet to post No. 6, northeast corner post of claim; thence S. 45 degrees E. three hundred (300) feet to post No. 1, the place of beginning.

"Variation, 15 degrees E.

"The discovery shaft of said claim is situate on the northeastern slope of Aspen mountain. The said lode was located on the 20th day of June, 1880."

VII.

That on, to wit, the twentieth day of October, A. D. 1884, the defendants entered upon the said premises hereinbefore mentioned and described, and on said day wrongfully and unlawfully excluded the plaintiff from the possession thereof and every part thereof, and ever since have, and still have, the possession of said premises, and since said date have wrongfully and unlawfully excluded, and still do wrongfully and unlawfully exclude, the plaintiff from the possession of said premises and every part thereof, to his damage in the sum of one thousand dollars ($1,000).

For a second cause of action the plaintiff complains and alleges:

I.

18 That the plaintiff is a citizen of the State of Colorado, and that the defendant, Jerome B. Wheeler, is a citizen of the State of New York, and the defendant, Clinton Markell, is a citizen of the State of Minnesota.

II.

That the value of the interest in the premises here sued for in this action and the matter in dispute herein, exclusive of costs, exceeds the sum or value of $5,000.

III.

That on, to wit, the 11th day of March, A. D. 1884, and ever since, hitherto, the plaintiff was and is the owner of an undivided one-half (½) part and interest of and in the Vallejo lode and mining claim, 1,500 feet in length by 300 feet in width, situate in Roaring Forks mining district, Pitkin county, and State of Colorado, and on

said day was in possession, and ever since has been, and is now, entitled to the possession thereof.

IV.

That he claims the right to occupy and possess said premises by virtue of a full compliance with the local laws and rules of miners of said mining district, the laws of the United States, and of the State of Colorado, by himself and his grantor, as an interest in a lode mining claim duly located on the public domain of the United States.

That said Vallejo lode and mining claim was on or before the 20th day of June, A. D. 1880, discovered by the Josephine Mining and Prospecting Company, James W. McGee, and Charles W. E. Miller, who afterwards, to wit, on or about the 11th day of August, A. D. 1880, duly located and staked the same as a lode mining
19 claim, and recorded the location certificate thereof in the office of the clerk and recorder in the county in which the said premises were situate; that thereafter, to wit, on the 11th day of October, A. D. 1884, George H. Hewitt and the defendants having then become the owners of a certain undivided interest in the said Vallejo lode and mining claim —, for the purpose of further description, and without waiver of any previous rights, cause a further record of said Vallejo lode and mining claim to be made and filed for record in the county in which said premises are situate, wherein and whereby said lode is described by metes and bounds as follows, to wit:

"Beginning at corner No. 1, a substantial post, whence cor. No. 1, 3650, Steele lode, bears S. 37 degrees 20′ E. 61.5 feet; thence S. 47 degrees 59′ E. 336 feet to cor. No. 2, a substantial post; thence N. 76 degrees 35′ E. 686.52 feet to south side center stake and 1,373.05 feet to cor. No. 3, a substantial post, whence a pine stump 10″ dia. 2′ high bears S. 82 degrees 30′ E. 6.5 feet, east end of Red mountain, bears N. 17 degrees 55′ E., a prominent rock on West Aspen Mt., bears N. 45 degrees 18′ W.; thence N. 47 degrees 59′ W., 350.5 feet, to cor. No. 4, a substantial post, whence an Aspen stump 11″ dia. 5 feet high bears S. 39 degrees 15′ W., 13.1 feet, an Aspen stump 12″ dia. 3 feet high bears N. 69 degrees 10′ W., 20.8 feet, east end of Red Mt., bears N. 19 degrees 35′ E.; thence S. 76 degrees .05′ W., 682.4 feet, to north side center stake and 1,364.8 feet to cor. No. 1, place of beginning. Variation, 14 degrees 45′ E., this being the same lode originally located on the 20th day of June, 1880."

20 That plaintiff claims a one-half (½) interest in said Vallejo lode mining claim by purchase and by virtue of conveyance from said The Josephine Mining and Prospecting Company.

V.

That the said The Josephine Mining and Prospecting Company, the grantor of plaintiff and one of the locators of said lode mining claim as aforesaid, was at the time of the said location of said lode mining claim a corporation duly organized and existing under and

by virtue of the laws of the State of Colorado for the purpose and object of prospecting for valuable mineral deposits on the public domain of the United States within said State and of mining valuable mineral in said State.

That each and all of the incorporators of said corporation and each and all of the members thereof at the time of the said location were citizens of the United States of America, severally and individually qualified and competent to enter upon the public domain of the United States and acquire title to the public mineral lands by discovery and location, as provided by act of Congress; and said corporation did, by and through its agent, the superintendent of said company, enter upon the public mineral domain of the United States, and, together with the said McGee and Miller, discover and locate the said Vallejo lode mining claim, the said location being made in the name of Miller, McGee, and the Josephine Mining and Prospecting Company, the discovery and location being for the use and benefit of, to wit, Miller and McGee one-half, and the members of said corporation one-half.

VI.

21 That on, to wit, the 20th day of October, A. D. 1884, the defendants entered upon the said premises hereinbefore mentioned and described, and on said day wrongfully and unlawfully excluded the plaintiff from the possession thereof, and every part thereof, and ever since have had, and still have, the possession of the said premises, and since said date have wrongfully and unlawfully excluded, and still do wrongfully and unlawfully exclude, the plaintiff from the possession of said premises and every part thereof, to his damage in the sum of one thousand dollars ($1,000).

Wherefore plaintiff prays judgment against defendants:

I.

For the recovery of the possession of an undivided one-half (½) interest in said Vallejo lode and mining claim, as described in said first cause of action.

II.

For the recovery of the possession of an undivided one-half (½) interest in said Vallejo lode and mining claim, as described in said second cause of action.

III.

For the sum of $1,000 damages and for costs of suit.

(S'g'd) HUGH BUTLER,
T. D. W. YONLEY,
Attorneys for Plaintiff.

22 (Endorsed:) 1784. In the circuit court of the United States in and for the district of Colorado. Alexander B. McKinley, pl'ff, *vs.* Jerome B. Wheeler and Clinton Markell, def'ts. Amended complaint. Filed Jan. 20, 1886. (S'g'd) Edward F. Bishop, clerk. Hugh Butler [and] T. D. W. Yonley, plaintiff's attorneys.

And afterwards, and on, to wit, the 23d day of January, A. D. 1886, came again the said defendants, by their attorney aforesaid, and filed in said court and in said cause their demurrer to the said amended complaint.

And the said demurrer to the amended complaint is in words and figures as follows, to wit:

Demurrer to Amended Complaint.

In the Circuit Court of the Eighth Judicial Circuit in and for said District.

ALEXANDER B. MCKINLEY *vs.* JEROME B. WHEELER *et al.*

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The defendants now come and demur to the amended complaint of the plaintiff and say that the same does not state facts sufficient to constitute a cause of action:

23 First. Because the said amended complaint does not state the nature of the plaintiff's estate in the premises, as required by statute.

Second. Because the same does not state that the plaintiff was or is entitled to the possession of the premises at the time of commencement of the action, or any part thereof, as required by statute.

Third. Because the said complaint does not state or allege any facts of discovery, location, or possession of any mining claim, as required by law.

Fourth. Because the said action appears to be brought by the plaintiff, as a tenant in common, against his cotenants.

Fifth. Because the plaintiff bases his title or claim of ownership to an undivided one-half of the said Vallejo lode mining claim upon a purchase and conveyance thereof from the Josephine Mining and Prospecting Company, a locator of said claim, and that said corporation was and is incapable of originally locating a mining claim, in whole or in part, under the statutes of the United States or of the State of Colorado.

Sixth. And for other and sufficient reasons appearing upon the face of said amended complaint.

(S'g'd) By PATTERSON & THOMAS,
DOWNING & FRANKLIN,
Attorneys for Defendants.

(Endorsed:) 1784. U. S. circuit court at Denver. McKin-
24 ley *vs.* J. B. Wheeler *et al.* Demurrer to amended complaint. Filed Jan. 23, 1886. (S'g'd) Edward F. Bishop, clerk. Patterson & Thomas, attorneys.

And afterwards, and on, to wit, the 23rd day of January, A. D. 1886, the same being one of the regular juridical days of the October term, A. D. 1885, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Demurrer to Amended Complaint Sustained. Cause Dismissed.

ALEXANDER B. McKINLEY
vs.
JEROME B. WHEELER and CLINTON MARKELL. } 1784.

Action for possession of specific real property and for damages.

At this day comes the said defendants, by C. S. Thomas Esq., their attorney.

And the demurrer of the said defendants to the amended complaint herein coming on now to be heard is submitted to the court, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said amended complaint is not sufficient in law for the said defendants to answer unto, and so the said demurrer is sustained.

Wherefore, on motion of the said defendants, it is considered by the court that this cause be dismissed; that the said defendants go hence hereof without day, and have and recover of and from
25 the said plaintiffs their costs by them in this behalf laid out and expended, to be taxed, and have execution thereof.

And afterwards, and on, to wit, the 3rd day of February, A. D. 1886, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause his bond, and sued out of said court a writ of error to the Supreme Court of the United States.

And the said bond is in words and figures as follows, to wit:

26 *Bond in Appeal or Error.*

United States Court, Colorado.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that we, the undersigned, Alexander B. McKinley, as principal, and Charles M. Campbell and Thomas B. McKaig, as sureties, are held and firmly bound unto Jerome B. Wheeler and Clinton Markell in the full and just sum of five hundred (500) dollars, to be paid to the said Jerome B. Wheeler and Clinton Markell, their heirs and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this third day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at the Octotober term, A. D. 1885, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between said Alexander B. McKinley, as plaintiff, and said Jerome B. Wheeler and Clinton Markell, as defendants, judgment was rendered against the said Alexander B. McKinley, and he, the said Alexander B. McKinley, having obtained a writ of error to reverse the judgment of said court and a citation directed to the said Jerome B. Wheeler and Clinton Markell, citing and admonishing them to be and appear at a term of the Supreme Court of the

United States to be held at Washington, D. C., on the second Monday of October next:

Now the condition of the above obligation is such that if the said Alexander B. McKinley shall prosecute said writ of error to effect, and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) ALEXANDER B. McKINLEY. [SEAL.]
(S'g'd) CHARLES M. CAMPBELL. [SEAL.]
(S'g'd) THOMAS B. McKAIG. [SEAL.]

Approved.
(S'g'd) MOSES HALLETT, *Judge.*

26½ [Endorsed:] Gen. No. 1784. Circuit court of the United States, district of Colorado. Alexander B. McKinley *vs.* Jerome B. Wheeler, Clinton Markell. Bond upon writ of error. $500.00. Filed this 3d day of Feb'y, A. D. 1886. (S'g'd) Edward F. Bishop, clerk.

Justification.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

Charles M. Campbell and —— ——, sureties on the within bond, being first duly sworn, each deposes and saith that he is worth more than the sum below set opposite his name—that is to say: As to —— ——, five hundred (500) dollars; as to —— ——, five hundred (500) dollars, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

(S'g'd) CHARLES M. CAMPBELL.
(S'g'd) THOMAS B. McKAIG.

Subscribed and sworn to before me, at Denver, this 3rd day of February, A. D. 1886.

[NOTARIAL SEAL.] (S'g'd) W. J. WEEBER, *Notary Public.*

27 And the said writ of error is next hereto attached, to wit:

28 *Writ of Error to — Court, U. S., District of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, between Alexander B. McKinley, plaintiff, and Jerome B. Wheeler and Clinton Markell, defendants, a manifest error hath happened, to the great

damage of the said Alexander B. McKinley, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3rd day of January, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 110th year.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
MOSES HALLETT, *Judge*.

28½ [Endorsed:] Gen. No. 1784. Circuit court of the United States. Alexander B. McKinley, plaintiff in error, *vs.* Jerome B. Wheeler & Clinton Markell. Writ of error to circuit court, U. S., district of Colorado. Filed in circuit court of the U. S. this 3rd day of Feb'y, A. D. 1886. Edward F. Bishop, clerk. Hugh Butler, attorney for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado*, } *ss*:

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court at Denver, in said district, this 10th day of March, A. D. 1886.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*.

The within writ of error having been served by lodging a copy thereof for the defendant in error in the clerk's office within sixty (60) days, Sundays exclusive, after the rendering of judgment herein, and having given the security required by law, this writ of error is therefore a supersedeas.

Teste: EDWARD F. BISHOP, *Clerk*.

29 And thereupon a citation was issued, duly served upon the said defendants, and returned and filed in said court and in said cause.

And the said citation is next hereto attached, to wit:

Citation.

30 Citation, U. S. — Court.

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to Jerome B. Wheeler and Clinton Markell, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein Alexander B. McKinley is plaintiff in error and you are defendant- in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 3d day of February, in the year of our Lord one thousand eight hundred and eighty-six.

MOSES HALLETT, *Judge.*

31 [Endorsed:] Gen. No., 1784. Circuit court of the United States, district of Colorado. Alexander B. McKinley, plaintiff in error, *vs.* Jerome B. Wheeler & Clinton Markell, defendant-in error. Citation. Filed in circuit court of the U. S. this 3d day of Feb'y, A. D. 1886. Edward F. Bishop, clerk. Hugh Butler, attorney for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

On this 3d day of February, A. D. 1886, service of the within citation was duly acknowledged for the defendants in error.

JEROME B. WHEELER,
CLINTON MARKELL,
Defendants in Error,
By PATTERSON & THOMAS,
Their Attorneys.

32 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby cer-

tify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein Alexander B. McKinley was plaintiff and Jerome B. Wheeler and Clinton Markell were defendants, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 10th day of March, A. D. 1886.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Clerk's fees:

Preparing transcript, 70 fol's, at 10c.	7 00
Certificate and seal	35
Paid by pl'ff in error	$7 35

Endorsed on cover: Colorado C. C. U. S. No. 859. Alexander B. McKinley, plaintiff in error, *vs.* Jerome B. Wheeler and Clinton Markell. Filed March 17, 1886.

FILED,
JAN 20 1899
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ALEXANDER B. McKINLEY,
Plaintiff in Error,
vs.
JEROME B. WHEELER AND CLINTON MARKELL,
Defendants in Error.

ASSIGNMENT OF ERRORS.

And now comes the plaintiff in error by Hugh Butler, his attorney, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

I.

The Court erred in sustaining the defendants' demurrer to the plaintiff's amended complaint, and in entering judgment for the defendant upon said demurrer.

Wherefore, plaintiff in error prays that judgment may be reversed and said cause remanded to the Circuit Court for further proceedings according to law.

HUGH BUTLER,
Att'y for Plaintiff in Error.

FILED.
OCT 20 1886
JAMES H. McKENNEY,
CLERK.

MOTION TO ADVANCE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 859.

ALEXANDER B. McKINLEY, PLAINTIFF IN ERROR,

vs.

JEROME B. WHEELER AND CLINTON MARKELL,

DEFENDANTS IN ERROR.

INDEX.

	PAGE.
Motion to Advance	1–2
Statement	3–6
Locations by Corporations	9–25
COLORADO—Dolores County	9
Chaffee County	9–12
Lake County	13–14
Gilpin County	14–15
Gunnison County	16
Park County	16–17
Hinsdale County	18
San Miguel County	19
Saguache County	19
La Plata County	20
San Juan County	20
Ouray County	20–21
Custer County	21
MONTANA.—Lewis and Clarke County	22
Silver Bow County	22
NEVADA—Humboldt County	23
Lincoln County	23
WYOMING—Carbon County	23
CALIFORNIA—Butte County	24
ARIZONA—Pima County	24
Exhibit B—Affidavit Register U. S. Land Office, Central City, Colo	25
" C—Letter Acting Commissioner General Land Office	26
" D—Certificate Secretary State of Colorado	26
" E—Affidavit Hal Sayr, Mining Engineer	27
" F—Affidavit J. G. Pohle	28
" G—Affidavit Surveyor-General of Colorado	29
" H—Letter Commissioner General Land Office	29
" I—Letter Commissioner General Land Office to The Secretary of the Interior	30
" J—Letters of The Secretary of the Interior to The Attorney-General	31
" K—Stipulation of Counsel	32
" L—Precedents—Memoranda	32

C. J. KELLY, PRINTER,
408 HOLLADAY STREET.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

ALEXANDER B. McKINLEY,
Plaintiff in Error,

vs.

JEROME B. WHEELER, AND CLINTON MARKELL,
Defendants in Error.

Motion to Advance.

And now comes the plaintiff in error in the above entitled cause, by Hugh Butler, his attorney, and respectfully petitions this Honorable Court to advance said cause on the docket, so that it may be argued and determined at the present October Term, A. D. 1886.

This application is made for the following reasons, all of which are supported by certain affidavits, certificates and other papers filed herewith and marked Exhibits "A," etc., and prayed to be considered herewith.

First—The only question involved in the case is whether a corporation organized under the laws of the United States, or some State or Territory thereof, may locate lode mining claims the same as individuals, who are citizens of the United States, may do.

Second—The question involved is presented by a demurrer to the complaint; the complaint averred that plaintiff's title was derived from a corporation which had located said claim on the public mineral lands; the demurrer assigned cause that such a location, to-wit, by a corporation, was invalid; the judgment of the circuit court was for defendants on their said demurrer.

Third—This question involves the construction of a statute of the United States, namely, the Act of Congress of May 10, 1872. The said statute is in the nature of a grant, and while the present doubts exist, and until the statute is construed by this Court, the full benefit of the grant will be denied.

Fourth—The question involved in this case is one of general public interest and of great importance to a large number of the citizens of the United States.

Fifth—The statute referred to has been construed, and the question involved decided, in opposite ways by different departments of the Government. The Department of the Interior has conceded the right of corporations to locate and has patented such locations; the Circuit Court of the United States for the District of Colorado, in this case, has denied that right and held that such locations were invalid.

Sixth—The title to many hundreds, and probably thousands, of mining properties depend on the decision in this case. An early decision is of grave importance to the owners of such properties.

Seventh—Great uncertainty in regard to titles to mining properties and much litigation may be prevented by an early decision of this case.

Eighth—The values of many hundreds of mines and mining claims are rendered uncertain and are depreciated, pending a decision of the question involved in this case.

Ninth—Applications for patent are now pending in the General Land Office of the United States, involving this question, and such applications are stayed, pending a decision of the question by this Court. An early decision of the question is of great importance in the proper administration of the affairs of the Interior Department.

Respectfully submitted,

HUGH BUTLER,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 859.

ALEXANDER B. McKINLEY, PLAINTIFF IN ERROR,

vs.

JEROME B. WHEELER AND CLINTON MARKELL, DEFENDANTS IN ERROR.

Statement.

This case was brought in the Circuit Court of the United States, for the District of Colorado, and is an action of ejectment, for the recovery of the possession of an undivided one-half part of the Vallejo lode mining claim, in Roaring Forks mining district, Pitkin county, Colorado. The complaint disclosed, as was necessary, that plaintiff's title was derived, through sundry mesne conveyances, from the Josephine Mining and Prospecting Company, a corporation organized under the laws of the State of Colorado. Defendant interposed a demurrer, assigning, among other causes, that a corporation could not originally locate a lode mining claim, either in whole or in part. All other causes of demurrer were waived and abandoned and argument was had on this question only. The Circuit Court held that a corporation could not locate, and sustained the demurrer. Leave was given plaintiff to amend his complaint, so as to show that all the members of the corporation were citizens of the United States. An amended complaint, of this character, was filed, and the same demurrer interposed, and was sustained by the Court without argument. Judgment was thereupon rendered for defendant. Plaintiff brought the case to this Court by writ of error. The only question presented for the decision of this Court is the said question of the right of such a corporation to locate a lode mining claim. This appears by the record, as well as by the admission of counsel for defendants in error. (See Exhibit K, filed herewith and printed in appendix.)

This question is one of grave importance to many citizens of the United States, and especially to those of the mining States and Territories. The members of every corporation formed for the purpose of acquiring and developing mining property have an interest in the early decision of the question; each corporation is composed of at least a few members, and some are composed of large numbers of persons;

there are in Colorado alone many hundreds of such corporations. (See affidavit Secretary of State of Colorado, Ex. D).

To corporations which have already acquired mining property by location, the early decision of the question is of the highest importance. The certificates filed as Exhibits with this motion, and printed in the appendix, contain the names of about nine hundred such locations. (See Exhibits A—1, A—2, etc.) The certificates are not the results of exhaustive searches for all such locations, except in the case of Chaffee and Lake Counties, formerly Lake County; all locations in those counties are included in the certificates from said counties; in other counties, the lists include only some of the locations. It was considered that it would be satisfactory to show that such locations were common and general throughout the mining States and Territories, and that a few hundred scattered over several of the States and Territories would be sufficient for that purpose.

Patents for many of these mining claims, so located, have been issued by the general Government. We are unable to furnish information as to the exact number, inasmuch as the local Land Offices of the United States preserve no records of this matter, but forward the papers to the general Land Office at Washington; and it is impracticable to obtain the information from the general Land Office. (See Exhibits B and C.) The last mentioned Exhibits, however, as well as the affidavit of Hal Sayr, Mining Engineer, (Ex. E), and the certificate of Moritz Stockder, Recorder of Hinsdale County, Colorado, (Ex. A—10), furnish evidence that many of such mining claims have been patented. There is no difference in this regard, however, between mining claims so located but not patented, and those which have been patented. Valuable mining claims are frequently held and worked for years, under the possessory titles merely, evidenced by the location certificates; and such titles are often transferred many times. The owners of claims so located, whether patented or not, have an equal interest in learning, at as early a time as possible, whether their acts of location were or were not valid and authorized by said Act of Congress. Until that question is settled the value of their properties, for selling purposes at least, is depreciated.

Those properties which may be transferred, in ignorance of the decision of the Circuit Court, or notwithstanding it, will give rise to additional litigation in many instances, if the ultimate decision in this case, after a period of say three years, should be that such locations were invalid and nothing passed to the supposed vendee.

Many of these deplorable results will be avoided by an early decision in this case. While the question of the right of a corporation to locate remains in its present disputed condition, disastrous results must inevitably flow, and the interests of many persons must suffer; and these results will, in a large measure, be prevented by an early decision of this case. In the event this question should not be decided by this Court for, say three years, and it should then be decided in favor of the right of the corporation, many persons will have been deprived of the benefit of the statute, and the Act will have been, in a measure, stayed and rendered inoperative in the meantime, because

the General Land Office may have refused to issue many patents which should have been issued (see Ex. I, letter Commissioner of General Land office), and many corporations cognizant of the decision of the Circuit Court and the doubts surrounding the question, will have been deterred from making such locations (see Ex. E, affidavit Hal. Sayr, M. E.) On the other hand, should the decision, at the end of such period, be against the corporation, many of the locations already so made will have been transferred, bringing into the matter new parties and causing litigation between the parties to such transfers; doubtless other new locations will be made by some of the many corporations now in existence for such purpose—such corporations being ignorant of the decision of the Circuit Court.

The affidavit of the Surveyor General of The United States for State of Colorado (Exhibit G) is offered as further showing the importance of an early decision, and the interest of the general public in the question involved.

In this showing only original locations have been included. There are very many instances of "amended" and "additional" location certificates filed by corporations which in many cases are practically new locations. This presents a question closely allied to if not the same, as involved in this case; these instances would multiply the number of corporations interested in an early decision of this case many times.

The fact that such locations have not been questioned by Department of the Interior, and subordinate offices, is shown by the letter of the Commissioner of the General Land office (Exhibit H), affidavit of Surveyor General for Colorado (Exhibit G), and affidavit of Register United States Land Office, Central City (Exhibit B).

The letter of the Commissioner of the General Land Office shows applications for patents for such locations to be now pending in that office. The affidavit of J. G. Pohle (Exhibit F) shows a case pending in court at the present time involving said question. These instances serve to show, as we submit, that the question involved in this case is constantly presenting itself in all forms, so as to commend the matter of an early decision by the highest tribunal to the favorable consideration of the Court.

The letters of the Secretary of the Interior and the Commissioner of the General Land Office, showing the importance of an early decision of this question, to the Department of the Interior, are printed in the appendix, with the exhibits offered by plaintiff in error. Authenticated copies of said letters are filed in the cause. (Exhibits I and J.)

Inasmuch as we are unable to find reported any decisions of this Honorable Court construing the rules of the Court in applications of this nature, we respectfully submit to the Court two precedents, as we believe, (being unreported cases), for the favorable consideration of this application. These cases were apparently advanced for similar reasons, as presented in the letters of the Secretary of the Interior and Commissioner of the General Land Office. The cases referred to are given in the appendix, (Exhibit L.) The application in this respect, it seems, might be considered under

Sections 5 and 7 of Rule 26, Supreme Court of the United States—Rules adopted January 7, 1884. The application on the part of counsel for plaintiff-in-error is made under said Rule 7: "No other "case will be taken up out of the order on the docket, or be set down "for any particular day, except under special and peculiar circum-"stances, to be shown to the Court." The Exhibits, with this statement, are offered as a showing to the Court of special and peculiar circumstances, warranting the advancement of the cause, and commending the application to the favorable consideration of the Court. Respectfully submitted,

HUGH BUTLER,
Attorney for Plaintiff-in-Error.

APPENDIX.

LODE MINING CLAIMS LOCATED BY CORPORATIONS.

EXHIBIT A—1.

STATE OF COLORADO, } ss.
County of Dolores, }

I, F. R. Lewis, Clerk and Recorder within and for said county, in the State aforesaid, do hereby certify that the following lode mining claims, among others, were located by corporations, either in whole or in part, as appears by the location certificates thereof of record in my office:

Bobtail, February 18, 1881,
Chittenden, January 4, 1882,
Carbonita, January 1, 1882,
Comet, January 1, 1882,
Jefferson, June 4, 1881,
Little Pet, December 15, 1881,
Northwestern, February 18, 1881,
Prudence, October 6, 1883,
Royal Gorge, January 4, 1882,
Raymond, January 4, 1882,
Silver Wedge, July 14, 1880,
Silver Belle, October 13, 1881,
Lord Chief Justice Coleridge, November 1, 1883.

Witness my hand and official seal this 27th day of September, A. D. 1886.

[*Seal of Dolores County.*] F. R. Lewis.

EXHIBIT A—1½.

CHAFFEE COUNTY, COLORADO.

List of lodes embraced in Chaffee County, Colorado (formerly Lake County), located by incorporated companies previous to the year A. D. 1872:

NAME OF LODES.	NAME OF LODES.	NAME OF LODES.
Wm. Dailey,	Nightingale,	Strawberry,
Andrew Johnson,	Pongo,	Virgin,
Dolphin,	Quandary,	Ocean Wave,
E. M. Stanton,	Waucheech,	Liberty,
Portland,	Occidental,	La Plata,
Nile,	Robert Ridley,	Golden Schaff,
Awawanda,	Columbus,	Yellow Jacket,
Coffer of the Union,	Anchovy,	Copper Head,
Blett,	Brutus,	Occidental,
Rambler,	Americus,	Butterfly,
Ranger,	Emperor,	Printz Albert,
Pennican,	Conajoes,	Washington,
Swallow,	Cresus,	Mountain Lern,
Henry Ward Beecher,	Sieux,	Sunrise,
James Harland,	Cache,	Danger,
Arapahoe,	Brooklyn,	Grant,
Mingo, Bonita,	Canon City,	Caty Darling,
Cheyenne,	Liebig,	Elizabeth,
Silver Star,	Frankfort,	Pioneer,
Rionlet,	Sumner,	Clear Creek,
Emerald,	Manhattan,	Fountain,

NAME OF LODES.	NAME OF LODES.	NAME OF LODES.
Palmetto,	Weldon,	Miners' Pride,
Nubian,	Palestine,	Julia,
Daniel Drew,	Argosa,	Rattle Snake,
Masco,	Dono Ana,	Great Eastern,
Pembina,	Platonic,	Bohlson,
Amazon,	Shoshone,	Steinham,
Copoco,	Bazaar,	Redwing,
Oneata,	Long,	Snow Storm,
Crescent,	Republican,	La Plata,
Ne Plus Ultra,	Monarch,	Arkansas River,
McClintock,	Volcano,	Lincoln,
Hidulgo,	Bosphorus,	Anawanda,
Tartar,	Robert Burns,	Star,
King Solomon,	Ætna,	Porcupine,
Olive Branch,	Pakomin,	Vermont,
Orchus,	Australia,	Words Wounder,
Lignum Vita,	Oronoco,	Germania N. I.
Provost,	Providence,	Trufant,
Tondonomutans,	Chicago,	Massachusetts,
Cuvier,	Darwin,	Dawn,
Seneca,	Constitutional,	Evidence,
Jefferson,	Black Hawk,	John A. Logan,
Goethe,	Gray Eagle,	X,
Edinburg,	Spondulix,	Magenta,
Powhattan,	Xenophon,	Thermodita,
Bonus,	Great Eastern,	Sprague,
Manzaneta,	Colorado,	Emancipator,
Orleans,	Taos,	Radical,
Artic,	E Pluribus Unum,	Linden,
W. T. Sherman,	Montezuma,	Volunteer,
General Thomas,	Silver Eagle,	Talgue,
Phil. Sheridan,	U. S. Grant,	Lookout,
Holland,	Niles,	Democrat,
North and South,	Cleopatria,	Magdalin,
Mono,	Denver,	Percival,
Hoosier,	Eldorado,	Tambertain,
Dodge,	Congress,	Bruce,
Brave,	Bannock,	Lacross,
Moon Beam,	Ogavita,	Marengo,
Bolivia,	Red Rover,	Apex,
Bohemian,	Bob Morris,	Polar,
Nieger,	Achilles,	Mingo,
Oriental,	Clinton,	Pontiac,
Independence,	Manhattan,	Eldorado,
Sclavonic,	Kossuth,	D. W. Powers,
Governor,	Badaxe,	Last Chance,
Clear Creek,	Banner,	Robert Knight,
National,	New York,	Sucker Boy,
Bishop Simpson,	Giant,	Camille,

NAME OF LODES.	NAME OF LODES.	NAME OF LODES.
Emporium,	Merrimac,	Young America,
Oneida,	Flora Temple,	Champ.
Goliah,	North Star,	Bluff,
Red King,	Mountain Queen,	Harry Comb,

List of lodes embraced in Chaffee County, Colorado (formerly Lake County), located by incorporated companies from and including the year 1872 to the date of the organization of Chaffee County, 1879.

NAME OF LODES.	NAME OF LODES.	NAME OF LODES.
Julia,	T. C. Hanford,	Nora's Man,
Esperanza,	Thunder Bolt,	Grand Central,

STATE OF COLORADO, }
County of Chaffee. }

I, E. B. Jones, Clerk and Recorder within and for said county, in the State aforesaid, do hereby certify that the within and foregoing lode mining claims, among others, were located by corporations, either in whole or in part, as appears by the location certificates thereof on record in my office.

Witness my hand and official seal this second day of October, A. D. 1886.

[*Seal.*]

E. B. JONES, *Clerk and Recorder,*
Chaffee County, Colorado.
By THOS. R. FRENCH, *Deputy.*

EXHIBIT A—2.

CHAFFEE COUNTY, COLORADO.

Name of lodes preempted by Corporations, from 1879 to October 1st, 1886, inclusive:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Arlington,	Henry Altman,	Ohio,
American Flag,	Hale,	Old Reliable,
Black Hawk,	Horton,	Ohio,
Badger Boy,	Hidden Treasure,	Our Fortune,
Badger Girl,	Hecla,	Pennsylvania,
Bowen,	Henrietta,	Poncha,
Brewer,	Iowa,	Poncha No. 1,
Bunker Hill,	Illinois,	Pedagonge,
Buckeye,	Indiana,	Putty,
Ben Franklin,	Iron,	Prince Albert,
Ben Butler,	Iron Monitor,	Queen of Sheba,
Bemis,	Iron Key,	Rainbow,
Glin Nettie,	I X L,	R. N. Scott,
Cumberland,	Iron King,	Song Bird,
Copper,	Julia,	Sunny Side,
Calumet,	John A. Logan,	Sherman,
Cherubim,	John Kelker,	Sarah,
Carrollton,	Krause,	Sunny Side,
Chicago Boy,	Kerr,	Sunshine,
Consolidated,	Kate Chase,	Snow Flake No. 2,
Delaware,	Kansas,	Snow Flake No. 1,

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Dickey,	Logan,	Sherman,
Denver,	Little Printer Boy,	Spring,
Diamond,	Little Missouri,	Sedalia No. 2,
Diamond Joe,	Little Pearl,	Snow Drop,
Eldorado,	Louise,	Sarah,
Eclipse,	Levrathan,	Silver Wave,
Elmer,	Little Gabe,	Surprise,
Enda,	Little Cassino,	The White Swan,
Fairview,	Lone Star,	Tenderfoot,
Fraction No. 2,	Mary Murphy,	Toronto,
Franklin,	Michigan,	Treasure Trove,
Grand Central,	Maine,	U. S. Seven Thirty,
Grant,	May Flower,	U. S. Treasury,
Gilmore,	Minnesota,	Vermont,
Good Shepherd,	Minoyonk,	Virginia,
Garfield,	Mammoth Cross,	Victory,
Gold Bird,	Marquis Extension,	Wisconsin,
Gertrude,	New Jersey,	War Eagle,
Gipsy King,	New York,	Wheeler,
Golden Star,	New Haven Boy,	Wild Irish Boy.
Gray Eagle,	Nora,	

STATE OF COLORADO, } ss.
County of Chaffee. }

I, E. B. Jones, Clerk and Recorder within and for said County, in the State aforesaid, do hereby certify that the within and foregoing lode mining claims, among others, were located by corporations, either in part or in whole, from 1879 to October 1st, 1886, inclusive, as appears by the location certificates thereof on record in my office.

Witness my hand and official seal this second day of October, A. D. 1886.

E. B. JONES, *Clerk and Recorder,*
Chaffee County, Colorado.

[*Seal of Chaffee County.*] By THOS. R. FRENCH, *Deputy.*

EXHIBIT A—3.

CHAFFEE COUNTY, COLO.—AFFIDAVIT.

STATE OF COLORADO, } ss.
County of Chaffee, }

D. F. Arnold, being first duly sworn according to law, on oath deposes and says, that he is the same person who prepared and made two certain certificates containing the names of lode mining claims in Chaffee County, Colorado, located by corporations, both of said certificates being dated October 2, 1886; the first of said certificates containing 229 locations, being the lode mining claims located by corporations in Chaffee County, formerly Lake County, up to the time when Lake County was divided into two counties, and Chaffee County organized; the other of said certificates containing the names of 125

lodes, located by corporations, in Chaffee County, since its organization in 1879.

And affiant further says, that he made a personal search of the records of old Lake County, up to the year 1879, and Chaffee County since its organization, in 1879, and that said certificates are true and correct, and contain the names of all lode mining claims originally located by corporations and none others.

DEXTER F. ARNOLD.

Subscribed and sworn to before me, this 5th day of October, A. D. 1886. E. B JONES, *Clerk and Recorder.*

[*Chaffee County Seal.*] By THOS. R. FRENCH, *Deputy.*

EXHIBIT A—4.

LAKE COUNTY, COLO.—CERTIFICATE.

STATE OF COLORADO, } ss.
County of Lake, }

I, Frank M. Reardon, County Clerk and Recorder within and for said county, in the State aforesaid, do hereby certify that I have examined the records of this county since 1879, and find recorded location certificates for the following lode mining claims in which corporations are named as locators in whole or in part:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Five Twenty,	Day,	J. W. F.,
Ayres L. Garver,	Iowa Boy,	White Rabbit,
Governor Gear.	Little Dorrit,	Francis C.,
Niles Hand,	Nova Scotia,	Mountain Lion,
Knoxville,	Concord No. 2,	Fay.
Finnich,	Lincoln,	Grace,
Ada,	William Penn,	Setting Sun,
R. L. R,	Nonantum,	Snow Shoe,
Little Saur,	Massasoit,	Luella,
Baby Mine,	Grinnell,	Little Diana,
Tunnel,	Moosehead,	Jane Eugene,
Lum Wilson,	Yucatan,	Little Lou,
Clarion,	Tiger,	Little Mac,
Yankee Doodle,	Nellie,	J. H.,
State of Maine,	Nellie,	J. F,
Lizzie,	Carrie,	W. A.,
Coal Banks,	Martha Washington,	Wedge,
R. C. Clowry,	Ephnan,	Vandalia,
Ester,	Washing,	Buckeye Boy,
Hood,	Emma,	Half Moon,
Hawthorne,	Schlosser,	Chrysolite No. 2.
Rosa,	Brightly,	Remona,
Waterbury,	Dudley,	Burchnell,
Clontarf,	Moore,	Gen. Arthur,
Washington,	Ellen E.	Piney,
S. T. Armstrong,	Gen. Crane,	Plymouth,
Kennebec,	Garfield,	Huckel,
Bradford,	Elmira,	McKeon,

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Felix,	Peerless,	William,
Hananer,	Hunter,	Spring Thompson.

Witness my hand and official seal, this 13th day of September, A. D. 1886.

[*Seal of Lake County.*] F. M. REARDON, *County Clerk and Recorder.*

EXHIBIT A—5.

LAKE COUNTY, COLO.—AFFIDAVIT.

STATE OF COLORADO, } ss.
County of Arapahoe, }

Frank M. Reardon, being first duly sworn according to law, deposes and says: "I am the County Clerk and Recorder within and for said County of Lake, in the State of Colorado, and I am the same person who made the certificate dated September 13th, 1886, giving the names of ninety lode mining claims, located by corporations, as appeared by the location certificates of record in my office; that all of said ninety lodes were originally located by corporations, and all of the said location certificates referred to were original location certificates; that by the instructions of A. B. McKinley, who requested said search and certificate, only original locations were included in my certificate.

"I further state that there are large numbers of amended location certificates of record in my office of lode mining claims located by individuals and thereafter acquired by corporations, and amended location certificates filed by such corporations.

"FRANK M. REARDON,
"*County Clerk and Recorder of Lake County.*"

Subscribed and sworn to before me this fourth day of October, A. D. 1886.

[*Notarial Seal.*] JESSE C. BALL, *Notary Public.*

EXHIBIT A—6.

GILPIN COUNTY, COLORADO.—CERTIFICATE.

STATE OF COLORADO, } ss.
County of Gilpin. }

I, Bart Robins, Clerk and Recorder within and for said county, in the State aforesaid, do hereby certify that the following lode mining claims, among others, were located by corporations, either in whole or in part, as appears by the location certificates thereof on record in my office:

NAME OF LODES.	NAME OF LODES.	NAME OF LODES.
Esler,	Ridge,	Big Bone,
Deep River,	Tunnel, No. 1,	Pizarro Extension,
Caslo,	Gold Ring,	Pewabic,
George W. Ellery,	Wyandotte,	Pewabic,
Alonzo Furnald,	East Leavenworth,	Benton,
R. P. Raney,	West Wyandotte,	Tonawanda,
Black Quartz,	Effie,	Desota,

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Alonzo Furnald,	Augusta May,	East Leavenworth, No. 2
Herbert Spencer,	Blagden,	Crystal,
Arapahoe,	Ezra White,	Flint,
Number 1,	Big Pittsburg,	Railroad,
Tunnel, No. 5,	Good Return,	Little Chance,
Tunnel,	Warwick,	Marrion,
Hunter,	Annie,	Juanita,
Bald Mountain,	South Frieberg,	Burroughs,
Haword,	Edgar,	Paola,
Kansas, No. 3,	Sunnyside,	Gondola,
Kansas, No. 2,	Boston Hop,	Pizarro,
Ezra White,	Dovetail,	Simmons,
Grule Stake,	Salt Lake,	Aztec,
Big Wampum,	Wallace,	Wallace,
Kansas,	Benton,	Silver,
Lucerne,	Silver,	Detroit,
West Haseltine,	Baltic,	Kansas,
Pewabic,	Little Mary,	Mystic,
Tiger,	Little Bobtail,	Amalia.
Mollier Newcomb,	Munroe,	
East Leavenworth,	Sweepstake,	

Witness my hand and official seal this 30th day of September, A. D. 1886.

[*Seal of Gilpin County.*]

BART. ROBINS, *County Clerk,*
Gilpin County, Colorado.

EXHIBIT A—7.

GILPIN COUNTY, COLORADO.—AFFIDAVIT.

STATE OF COLORADO, } ss.
County of Gilpin. }

Bart Robins, being first duly sworn according to law, deposes and says: I am the Clerk and Recorder of Gilpin County, in the State of Colorado, and am the same person who made a certain certificate dated September 30th, A. D. 1886, giving the names of eighty-two lode mining claims in this county located by corporations. That all of said lode mining claims were originally located by corporations, either in whole or in part, and all of the location certificates referred to in my said certificate were original location certificates.

I further state that, of my own knowledge derived from the records of this county, there are many other lode mining claims so located by corporations, and not included in said certificate.

I further state that some of said lodes so located have been patented, as appears by the United States patents of record in the office of the Clerk and Recorder of this county.

BART ROBINS, *Clerk and Recorder of Gilpin County.*

Subscribed and sworn to before me this fifth day of October, A. D. 1886.

[*Notarial Seal.*]

ROBERT S. HAIGHT, *Notary Public.*

EXHIBIT A—8.

GUNNISON COUNTY, COLORADO.

STATE OF COLORADO, } ss.
County of Gunnison. }

I, D. C. Scribner, County Clerk and Recorder within and for said county, in the State aforesaid, do hereby certify that the following lode mining claims, among others, were located by corporations, either in whole or in part, as appears by the location certificates thereof of record in my office:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Allen,	Brittle Silver,	Bell,
Dexter,	Springfield,	Bullion,
Alwilda,	Big Indian,	Sensation,
Denver,	Silver Age,	Beaconfield,
Arab,	Bird,	Big Strike,
Boston,	Wampum,	Sunny Side,
Dolittle,	Aspen Mill Site,	Silver King,
Woodstock,	Denver City,	Bruin,
Smuggler,	Alice,	Silver Islet,
Big Elephant,	Dan Taylor,	Silver Cup,
Stray Mule,	D. & R. G.,	Watt,
Silver Queen,	Bullion King,	Silver Jewel.
Smithsonite,	Silver Reef,	

Witness my hand and official seal, this first day of October, A D. 1886.

D. C. SCRIBNER,
[*Gunnison County Seal.*] *County Clerk and Recorder.*

EXHIBIT A—9.

PARK COUNTY, COLORADO.

STATE OF COLORADO, } ss.
County of Park. }

I, John L. Gray, Clerk and Recorder in and for Park County, in the State aforesaid, do hereby certify that the following lode mining claims, among many others in this county, have been located by corporations, as appears by the location certificates thereof of record in my office:

Hidden Treasure lode, by Park Range Prospecting and Mining Co., September 21st, 1881.

Index lode, by Park Range Prospecting and Mining Co., December 19th, 1881.

Illinois lode, by Nestor Mining Co., September 13th, 1882.

Julia lode, by Moose Mining Co., July 17th, 1876.

Mary lode, by Moose Mining Co., September 5th, 1878.

Matthews lode, by Comet Con. Mining Co., June 19th, 1883.

Ætna lode, by Park Range Prospecting and Mining Co., September 21st, 1881.

Anaconda lode, by Buckeye Mining Co., June 16th, 1881.

Ajax lode, by Berlin Mining Co., April 2d, 1881.

Asteroyd lode, by Fannie Barrett Mining Ass., December 16th, 1880.

Argentum lode, by Fannie Barret Mining Association, December 16th, 1880.

Abington lode, by Halls Gulch Consolidated Mining and Tunnel Co., July 1st, 1883.

Bog Silver lode, by Hall and Bronk Silver Mining Co., October, 6th, 1879.

Boundary lode, by Hall and Bronk Silver Mining Co., October 6th, 1879.

Boss lode, by Horse Shoe Mining Co., August 1st, 1878.

Blue Jacket lode, by Horse Shoe Mining Co., August 1st, 1878.

Bronnell lode, by Hall Valley Silver and Lead Mining and Smelting Co., February 9th, 1876.

Beaverly lode, by Dodge City Mining Co., October 17th, 1881.

Capt. Plummer lode, by Moose Mining Co, December 9th, 1875.

Casket lode, by Sampson Silver Mining Co., September 28th, 1877.

Carbonate Lake lode, by Horse Shoe Mining Co., August 1st, 1878.

Chamelon lode, by Crusade Mining Co., August 26th, 1880.

Comstock lode, by London Mining Co., September 2d, 1882.

Carbonate lode, by Carbonate Silver Mining Co., December 2d, 1884.

Dump lode, by Hall and Bronk Silver Mining Co., October 6th, 1879.

Dora lode, by Moose Mining Co., September 5th, 1878.

Diona lode, by Dodge City Mining Co., October 17th, 1881.

Flay lode, by Mt. Lincoln Silver Mining Co., September 27th, 1881.

Geneva lode, by Mullen's Mining and Prospecting Co., November 24th, 1879.

Godfrey lode, by Kansas Consolidated Silver Mining Co., December 1st, 1881.

Highland lode, by Moose Mining Co., June 17th, 1874.

Hope lode, by Sampson Silver Mining Co., September 28th, 1877.

Hard Cash lode, by Mullen Mining and prospecting Co., November 24th, 1879.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said county this sixth day of October, A. D. 1886.

[*Seal of Park County.*] JOHN L. GRAY, *Clerk and Recorder.*

STATE OF COLORADO, } ss.
County of Park. }

I, James F. Smith, Clerk of the District Court of the Fourth Judicial District of the State of Colorado, in and for Park County in said State, do hereby certify that John L. Gray, whose name is subscribed to above certificate, is the Clerk and Recorder of said Park County.

{ *Seal of District Court, 4th Judicial District for Park County.* }

Witness my hand and the seal of said Court, at Fairplay, in said county, this sixth day of October, A. D. 1886.

JAMES F. SMITH, *Clerk.*

STATE OF COLORADO, } ss.
County of Park, }

I, William Harrison, Judge of the District Court of the Fourth Judicial District of the State of Colorado, do hereby certify that Park County, in said State, comprises a portion of said Fourth Judicial District in said State, and that James F. Smith is the Clerk of said District Court, in and for said Park County, and as such Clerk said Smith is the custodian of the seal and records of said Court in said county.

Witness my hand and seal this 6th day of October, A. D. 1886.

[*Seal.*] WILLIAM HARRISON, *Judge.*

EXHIBIT A—10.

HINSDALE COUNTY, COLORADO.

STATE OF COLORADO, } ss.
County of Hinsdale. }

I, Moritz Stockder, Clerk and Recorder within and for said county, in the State aforesaid, do hereby certify that the following lode mining claims were located by corporations, either in whole or in part, as appears by the location certificates thereof of record in my office. And I further certify that United States patents have been issued and recorded for a number of said locations, as appears by the records of this county.

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
1. Sunnyside,	18. Morton,	35. Sycamore,
2. Dubois,	19. A. S. Stall,	36. Postal,
3. Winnebago,	20. U. S.,	37. Glen,
4. Ripon,	21. Empire,	38. Lizzie B,
5. Marinette,	22. Highland Chief,	39. Western Empire,
6 Green Lake,	23. High Muc-a-muc,	40. Torrent,
7. Hamlet,	24. Jennie,	41. White Swan,
8. Hercules,	25. Little Blue,	42. Integrity,
9. Emperor,	26. Lilly,	43. Little Giant,
10. Capitol City, iron,	27. Gunnison,	44. Twin,
11. Accidental,	28. Maine,	45. Spring,
12. Iron Mask,	29. Hollister,	46. Golden Chariot,
13. Duval,	30. Iron,	47. K. P.,
14 Pointer Boy,	31. Coney,	48. Witch,
15. Big Horn,	32. Larimore Bros.,	49. Milford,
16. Indiana,	33. Ellwood,	50. Biglow,
17. J. T. McKein,	34. Lone Tree,	51. Treasure Hill, spar

Witness my hand and official seal this 28th day of September, A. D. 1886.

[*Hinsdale County Seal.*] MORITZ STOCKDER,
County Clerk and Recorder.

EXHIBIT A—11.

SAN MIGUEL COUNTY, COLORADO.

STATE OF COLORADO, } ss.
County of San Miguel. }

I, Chas. F. Painter, County Clerk within and for said county, in the State aforesaid, do hereby certify that the following lode mining claims, among others, were located by corporations, either in whole or in part, as appears by the location certificates thereof on record in my office :

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Birmingham,	Josephine,	Raynolds,
Blue Jay,	Josephine,	Sledge,
Blue Bird,	Libby,	Silver Leaf,
Ballard No. 2,	Lape,	Sledge,
Curtis,	Morris,	Youtsey,
Cliff,	Mamie,	Yingling,
Duke,	Mattie Stout,	Lewis,
Emma,	Pompepi,	Lower Litty,
Forest City,	President Day,	Lincoln.
Gen. Munson,	Philadelphia,	
J. D.	Robert Emmett,	

Witness my hand and official seal, this 28th day of September, A. D. 1886. CHAS. F. PAINTER, *County Clerk.*
[*San Miguel County Seal.*] O. C. THOMAS, *Deputy.*

EXHIBIT A—12.

SAGUACHE COUNTY, COLORADO.

STATE OF COLORADO, } ss.
County of Saguache. }

I, Charles D. Jones, Clerk and Recorder, within and for said County, in the State aforesaid, do hereby certify that the following lode mining claims, among others, were located by corporations, either in whole or in part, as appears by the location certificates thereof on record in my office :

NAME OF LODE.	LOCATION.
Yellow Jacket,	Kerber Mining District.
Flag,	Smiths "
Fraction,	Smiths "
Monarch,	McDonough "
Cass,	McDonough "
Chicago,	Kerber "
Cornucopia,	Stowe "
American,	Kerber "
Peacock,	Kerber "
Merrimack,	Kerber "
Iron King,	Kerber "
Iron Clad,	Kerber "

Witness my hand and official seal, this 27th day of September, A. D. 1886. CHARLES D. JONES,
[*Saguache County Seal.*] *County Clerk.*

EXHIBIT A—13.

LA PLATA COUNTY, COLORADO.

STATE OF COLORADO, } ss.
County of La Plata, }

I, J. P. Coston, Clerk and Recorder within and for said county, in the State aforesaid, do hereby certify that the following lode mining claims, among others were located by corporations, either in whole or in part, as appears by the location certificates thereof, of record in my office:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Pacific,	Washington,	Anna,
St. Louis,	Rebecca,	Laura A.,
Mystery,	Wray,	Little Mary.
U. S. Grant,	Judge Land,	

Witness my hand and official seal, this 27th day of September, A. D. 1886.

J. P. COSTON,
Clerk and Recorder.

[*Seal of La Plata Co.*]

EXHIBIT A—14.

SAN JUAN COUNTY.—COLORADO.

STATE OF COLORADO, } ss.
County of San Juan, }

I, Thos. Chestnut, Clerk and Recorder within and for said county, in the State aforesaid, do hereby certify that the following lode mining claims, among others, were located by corporations, either in whole or in part, as appears by the location certificates thereof of record in my office:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Detroit,	Side Line,	Portland No. 1,
Etna No. 2,	Little Flossie,	Granger No. 1,
Chrystal,	A. A. Bevin,	Cumberland,
Lake Mountain,	Astor No. 6,	Artois.
Fitzgerald,		

Witness my hand and official seal, this 27th day of September, A. D. 1886.

THOS. CHESTNUT,
County Clerk.

[*Seal of San Juan Co.*]

EXHIBIT A—15.

OURAY COUNTY, COLORADO.

STATE OF COLORADO, } ss.
County of Ouray. }

I, R. W. Haskins, Clerk and Recorder within and for said county, in the State aforesaid, do hereby certify that the following lode mining claims, among others, were located by corporations, either in whole or in part, as appears by the location certificates thereof of record in my office:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Cader Idris,	Congress,	Young America,
Ivanhoe,	B. F. Jones,	Black Christal,
Bryn Mawr,	Susie,	Carrie Coddington,

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Rob Roy,	Little Ida,	Grand Falls,
Brooklyn,	Bertie,	Jersey Flat,
Fulton,	Dragon,	Lady Franklin,
Gotham,	Portsmouth,	Weaver,
Haslan,	Grey Squirrel,	Iron Cap,
King,	Forest Belle,	Brewster,
Lookout,	N. and O.,	Ground Hog,
Manhattan,	No. 5,	Keystone,
Osprey,	Sheldon,	Accident,
Triumph,	Jupiter,	Bob Tail,
Nassau,	Meuscar,	Divies,
White House,	Fiery Dragon,	General Grant,
Wakeman,	Winnebago,	Litchfield,
Adverse,	Chris Marsh,	Amphitheater,
Neptune,	Rahweigen,	Ed. Lynde,
F. A.,	Blanchard,	E. L. Martin,
Ada,	Walraven,	Sadie,
Oscar,	Jersey Lilly,	Sunnyside,
Doggett,	Morning Glory,	Eastern Belle,
Mountain Belle,	Little Nellie,	Dunderberg,
Grand Pacific,	Chrystal Spring,	Great Eastern,
Carrie,	Dolphin,	Hancock,
Cannon,		

Witness my hand and official seal this 29th day of September, A. D. 1886.

R. W. HASKINS, *Clerk and Recorder.*

[*Ouray County Seal.*]

GEO. C. PIERCE, *Deputy.*

EXHIBIT A—16.

CUSTER COUNTY, COLORADO.

STATE OF COLORADO, } ss.
County of Custer. }

I, W. E. Cox, County Clerk and Recorder, in and for said County, in the State aforesaid, do hereby certify that the following lode mining claims, among others, were located by corporations, either in whole or in part, as appears by the location certificates thereof of record in my office:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
June,	Number Six,	A. A. R.,
Golden,	Lottie B.,	Chester,
Mineral Park,	R. B.,	Pearl No. 2,
Ontario,	C. B. Bradbury,	Greentop,
Palmer No. 1,	Franklin,	Greenbacker,
Palmer No. 2,	Dineio,	Expectation,
Palmer No. 3,	Intruder,	Hope.
Palmer No. 4,	Rebecca,	
Metropolitan,	Margaret C.,	

Witness my hand and official seal, this 2d day of October, A. D. 1886.

W. E. Cox, *County Clerk and Ex-officio Recorder.*

[*Seal of Custer County.*]

By J. A. DAVIS, *Deputy.*

EXHIBIT A—17.

LEWIS AND CLARKE COUNTY, MONTANA TERRITORY.

Office of Clerk and Recorder, Lewis and Clarke County,

HELENA, Montana,——188

TERRITORY OF MONTANA, } ss.
County of Lewis and Clarke. }

I, W. E. Frederick, Clerk and Recorder, within and for said County, in the Territory aforesaid, do hereby certify that the following lode mining claims, among others in this County, were located by corporations, either in whole or in part, during this year, as appears by the location notices thereof of record in my office:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Alta,	Total,	Leviathan,
Rimini,	Treasure,	Power.

Witness my hand and official seal, this 27th day of September, A. D. 1886.

W. E. FREDERICK,
County Clerk.

[*Seal of Lewis and Clarke County.*]

EXHIBIT A—18.

SILVER BOW COUNTY, MONTANA TERRITORY.

TERRITORY OF MONTANA, } ss.
County of Silver Bow. }

I, H. S. Clark, County Clerk and *ex-officio* Recorder of Silver Bow County, Montana Territory, do hereby certify that the following lode mining claims, among others in this county, were located by corporations, either in whole or in part, as appears by the notices of location thereof of record in my office:

Reef Fraction lode mining claim, located October 18th, 1883, by the Alice Gold and Silver Mining Company, and situated in Summit Valley mining district, Silver Bow County, Montana Territory.

Independent lode mining claim, located June 24th, 1885, by the Colorado Smelting and Mining Company; situated in Independence mining district, and county and Territory.

Fredonia lode mining claim, located September 26th, 1885, by the Colorado Smelting and Mining Company *et al.*; situated in Independence mining district, and county and Territory.

Barago lode mining claim, located March 12th, 1886, by the Colorado Smelting and Mining Company; situated in Summit Valley mining district, and county and Territory.

In Witness Whereof, I have hereunto set my hand and the seal of said county this 25th day of September, A. D. 1886.

H. S. CLARK,
County Clerk and Recorder.

[*Silver Bow Co. Seal.*]

By CHAS. F. BOOTH, *Deputy.*

EXHIBIT A—19.

HUMBOLDT COUNTY, NEVADA.

STATE OF NEVADA, } ss.
County of Humboldt. }

I, J. J. Hill, County Recorder, in and for said County of Humboldt, State of Nevada, do hereby certify that the following lode or ledge mining claims, among others, were located by corporations, as appears by the location notices of record in my office:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
Cumberland,	General Hançock,	Summit,
Cincinnati,	Snow Flake,	Reflex.

In witness whereof I have hereunto set my hand and affixed my official seal, this 27th day of September, 1886.

J. J. HILL, *County Recorder,*
[*Seal of Humboldt County.*] *Humboldt County, Nevada.*

EXHIBIT A—20.

LINCOLN COUNTY, NEVADA.

STATE OF NEVADA, } ss.
County of Lincoln. }

I, G. H. Fish, Recorder of said County, in the State aforesaid, do hereby certify that the Valley Mill and Mining Company, a corporation organized under the laws of the State of Ohio, was one of the locators of the Fifth of July and Fifth of July No. 2 lode mining claims, situate in Pahranagate Lake Mining District, Lincoln County, State of Nevada, as appears by the certificate of location in my office.

Witness my hand and official seal, this 24th day of September, A. D. 1886.

G. H. FISH,
[*Seal of Lincoln County.*] *County Recorder.*

EXHIBIT A—21.

GARBON COUNTY.—WYOMING TY.

TERRITORY OF WYOMING, } ss.
County of Carbon, }

I, W. L. Evans, County Clerk and *ex-officio* Register within and for said county, and Territory aforesaid, do hereby certify that the following lode mining claims, among others, were located by corporations, either in part or whole as appears by the location certificates thereof of record in my office:

NAME OF LODE.	NAME OF LODE.	NAME OF LODE.
New Year,	St. Louis,	Colcotar,
Boston,	Domingo,	Frozen Finger.
Red Oxide,		

Witness my hand and official seal, this 28th day of September, A. D. 1886.

W. L. EVANS,
[*Seal of Carbon Co.*] *County Clerk and Register of Deeds.*

EXHIBIT A—22.

BUTTE COUNTY.—CALIFORNIA.

STATE OF CALIFORNIA, } ss.
County of Butte, }

I, T. A. Atchison, County Recorder in and for said county, in the State aforesaid, do hereby certify that the following lode and placer mining claims, among others, were located by corporations, either in whole or in part, as appears by the notices of location thereof of record in my office:

Union mining claim, located June 6, 1873.

Bunker Hill claim, located August 18, 1873.

Cherokee Flat Blue Gravel Mining Co's claim, located September 1, 1873.

Cape Mining Co., located April 17, 1876.

North Star lode, located September 14, 1876.

Magalia Gold Mining Co's claim, located October 20, 1879.

Paramount Mining Co. claim, located October 10, 1879.

Mineral Slide Hydraulic Gravel Mining Co. claim, located December 24, 1879.

Red Hill Hydraulic Mining and Water, located January 2, 1880.

Eocene Tunnel and Mining Co., located April 20, 1880.

Big Bend Tunnel and Mining Co., located September 3, 1880.

Standard Gold Mining Co., located May 27, 1881.

Gamma mining claim and Alpha mining claim, located July 1, 1884, by Spring Valley Hydraulic Gold Co. (corporation).

Witness my hand and official seal, this 28th day of September, A. D. 1886.

[*Seal of Butte Co.*]

T. A. ATCHISON,
County Recorder.

EXHIBIT A—23.

PIMA COUNTY, ARIZONA TERRITORY.

TERRITORY OF ARIZONA, } ss.
County of Pima. }

I, A. B. Sampson, Recorder of said County, do hereby certify that the following lode mining claims, among others, have been located by corporations, either in whole or in part, as shown by the location certificates thereof recorded in my office:

NAME OF LODE.	NAME OF LOCATOR, AND WHEN LOCATED.
Blanco Blue Mine,	Arizona Mining Co et al., June 26, 1865.
La Esperanco,	Santo Domingo Mining Co., Mar. 17, 1873
Eastern Wing of Providentia,	Providentia Mining Co., Nov. 17, 1881.
Lombard,	San Catarina Copper Co., Jan. 24, 1882.
Lone Star,	Chariton G. & S. Mining Co., Jan. 1, 1882.
Agna Frio,	Pajorita Mining Co., Jan. 2, 1882.
Boomerang,	Pajorita Mining Co., Jan. 2, 1882.
Columbia,	Pajorita Mining Co., Jan. 2, 1882.
Florence,	Pajorita Mining Co., Jan. 2, 1882.
Bear,	Pajorita Mining Co , Jan. 2, 1882.
Highland Mary,	San Catarina Copper Co., Mar. 18, 1882.

NAME OF LODE.	NAME OF LOCATOR, AND WHEN LOCATED.
Tuckerman,	Pima Copper Mg. & Sg. Co., July 19, 1882.
Patterson,	Orion Silver Mining Co., Jan. 1, 1883.
Wright,	Orion Silver Mining Co., Jan. 1, 1883.
Gopher,	Santa Rita Land & Mg. Co., Jan. 1, 1883.
Doctor,	Salero Mining & Milling Co., Feb. 1, 1883.
Parke,	West Virginia & Arizona Mg. Co. Jan. 1, 1883
Devore,	West Virginia & Arizona Mg. Co. Jan. 1, 1883
Baker,	Ajo Mining & Smelting Co., Mar. 15, 1883
Lafayette,	Young America Cop. Mg. Co., Mar. 6, 1883
First Choice.	Union Mining Co., June 12, 1882.
Boston,	Pantano G. & S. Mg. of Arizona, Jan. 1, 1884
Troy.	Pantano G & S. Mg. of Arizona, Jan. 1, 1884
Eastern Light,	Mineral Mountain Mg. Co., Jan. 1, 1884.
Brick Top,	New York Hill Mg. Co., Jan 1, 1884.
Colorado,	New York Hill Mg. Co., Jan. 1, 1884.
Home,	Mineral Mountain Mg. Co., Dec. 22, 1884
I. O. C. & M. Co.,	Inter Ocean Cattle & Mg. Co., Jan. 1, 1885
Alder Creek,	Inter Ocean Cattle & Mg. Co., Jan. 1, 1885
Little Cottonwood,	Inter Ocean Cattle & Mg. Co, Jan. 1, 1885
Cherry Creek,	Inter Ocean Cattle & Mg. Co., Jan. 1, 1885
Scottish Chief,	Inter Ocean Cattle & Mg. Co., Jan. 1, 1885
Inter Ocean,	Inter Ocean Cattle & Mg. Co., Jan 1, 1886
Dale,	Inter Ocean Cattle & Mg. Co., Jan. 1, 1886

Witness my hand and official seal, this 28th day of September, A. D. 1886.

A. B. SAMPSON,
County Recorder.

[*Pima County Seal.*]

EXHIBIT B.

AFFIDAVIT REGISTER UNITED STATES LAND OFFICE, CENTRAL CITY, COLORADO.

STATE OF COLORADO, } ss.
County of Gilpin. }

Richard Harvey, being first duly sworn according to law, deposes and says: That he is the Register of the United States Land Office at Central City, Colorado, and has been such Register for seven years last past.

Affiant says that applications have been made at said land office, during his term of office, for patents to lode mining claims, the papers in which said applications showed that said lode mining claims were located, either in whole or in part, by corporations, which applications for patents on such locations were approved by him and thereafter patents were issued for such lode mining claims.

Affiant further says, that no record is kept in the local land office in such applications for patents as to when, how or by whom the locations were made, all the papers concerning applications for patents being forwarded to the General Land Office at Washington, and affiant is therefore unable to state how many such applications for patents have been made at said Central City land office.

RICHARD HARVEY,

Subscribed and sworn to before me this 4th day of October, A. D. 1886.

[*Notarial Seal.*] CHASE WITHROW, *Notary Public.*

EXHIBIT C.

LETTER ACTING COMMISSIONER OF GENERAL LAND OFFICE, 1886.—87520.—D. E. F.

Refer in reply to this initial
N.

Department of the Interior, J. T. J. F.
General Land Office. W. O. C.

WASHINGTON, D. C., August 24th, 1886.

A. B. MCKINLEY, ESQ.,
51 Barclay Building, Denver, Colorado.

SIR:—By reference from Jacob Frolich, Esq., I am in receipt of your letter of the 11th inst., in regard to Central City, Colorado, Mineral Entry No. 2906, made September 17, 1885, by the Consolidated Republican Mountain Mining Company, for the Peru lode mining claim and mill site, and have to advise you that there is no clerical force available for making a search of the records of this office to find how many patents have been issued for mining claims located wholly or in part by corporations. Neither can persons, not officers of the bureau, be allowed access to the files for such a search as you suggest.

Very respectfully,
S. M. STOCKSLAGER, *Acting Commissioner.*

EXHIBIT D.

CERTIFICATE OF SECRETARY OF STATE OF COLORADO.

STATE OF COLORADO, } ss.

I, Melvin Edwards, Secretary of State of the State of Colorado, do hereby certify as follows:

That by the laws of the State of Colorado relating to the formation of private corporations, being Chapter 19, General Laws of Colorado, 1877, and the amendments thereto, the certificates or articles of incorporation of all private corporations formed under the laws of said State are filed and recorded in the office of the Secretary of State; that the said laws provide for the organization of mining companies, among others, for the purpose of acquiring, by purchase and otherwise, mining property and working and developing the same.

That under the provisions of said laws, large numbers of mining corporations have been formed, and annually large numbers of articles of incorporotion are filed in the office of the Secretary of State; said certificates or articles of incorporation stating that the objects of such corporations are to acquire, by discovery and location, as well as by purchase, lode mining claims, and to develop and work the same; that many mining companies are organized for the express purpose of prospecting for lodes, leads, ledges and deposits of valuable minerals, and such purpose is expressed in the names and among the objects of such corporations in such certificates.

That since January, 1883, during the terms of office of the present Secretary of State, several hundred have been formed and as many are being incorporated now as in past years.

I further certify that the said incorporation laws of the State of Colorado provide that corporations organized under the laws of other States and Territories are required to file authenticated copies of their charters or articles of incorporation in the office of the Secretary of this State before transacting business in this State; that annually many charters or articles of incorporation are filed in the office of the Secretary of State for mining companies incorporated under the laws of other States and Territories whose objects, as expressed in such articles of incorporation and charters, are similar to those formed under the laws of the State of Colorado, as before mentioned in this certificate; that charters and articles of incorporation are now on file in this office for such mining corporations organized under the laws of nearly every one of the States and Territories of the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Colorado, at Denver, in said State, on this 4th day of October, A. D. eighteen hundred and eighty-six.

MELVIN EDWARDS,

[*Seal of State of Colorado.*] *Secretary of State.*

EXHIBIT E.

AFFIDAVIT OF HAL SAYR, MINING ENGINEER.

STATE OF COLORADO, } ss.
County of Arapahoe. }

Hal Sayr, being first duly sworn according to law, on oath deposes and says: that he resides in the State of Colorado, and has resided there since the year 1859; that he is a mining engineer, and has been engaged in mining and in the practice of his profession as mining engineer in the mining districts of Colorado, and particularly in the Counties of Gilpin and Clear Creek, for twenty-three years last past; that he is acquainted and familiar with the manner and mode in which gold and silver mining is carried on in said districts particularly and the State generally; that he knows, of his own personal knowledge, that numbers of lode mining claims have been located, either in whole or in part, by incorporated companies formed under the laws of the State of Colorado, or under the laws of some other State or Territory of the United States, and in many instances such mining companies have applied for and received United States patents for mining claims so located.

And affiant further states: that he knows that many mining companies are formed annually and incorporated under the laws of the State of Colorado, for the purpose of acquiring title to mining claims by location, purchase and otherwise. And affiant states that he knows personally that many companies are incorporated, under the laws of the State of Colorado, for the purpose of prospecting for gold and silver bearing ores, in the State of Colorado and elsewhere.

Affiant further states: that he knows of the decision of the Circuit Court of the United States for the District of Colorado, to the effect

that a corporation could not locate a lode mining claim, and that he believes that such decision has become generally known among the people of the State of Colorado interested in the mining industry; that said decision has created doubt in the minds of all such persons, as affiant verily believes, as to the right of a corporation to so locate mining claims, to such an extent that while said decision stands it will deter such persons from making any new locations, and will deter persons interested in mining, and those having knowledge of said decision, from incorporating companies for the purpose of prospecting for and locating lode mining claims. That said decision has also created doubts and feelings of insecurity in the minds of those owning lode mining property based on such locations, inasmuch as if said decision shall stand and be affirmed by the Supreme Court of the United States, it will create great confusion as to titles and much litigation among the owners of mining properties.

Affiant further states: that he has no interest in the suit of McKinley vs. Wheeler and Markell, in the Supreme Court of the United States, but that he verily believes an early decision of the said question of the right of a corporation to locate lode mining claims, which he is informed is involved in said suit, will be of great benefit to large numbers of persons interested in mining corporations and in mining operations in the State of Colorado and elsewhere.

HAL SAYR.

Subscribed and sworn to before me this fourth day of October, A. D. 1886.

G. N. SCAMEHORN,
Notary Public.

[*Notarial Seal*]

EXHIBIT F.

AFFIDAVIT OF J. G. POHLE.

STATE OF NEW YORK, }
County of New York, } ss.

J. G. Pohle being duly sworn, on oath says: I am the agent and manager of The Lebanon Mining Company of New York; the said company is a corporation organized under the laws of the State of New York; the Lebanon Tunnel Lode No 3, in Griffith mining district, Clear Creek County, Colorado, was located by said corporation and an adverse suit has recently been brought by the said corporation, as owners of said lode, against the owners of the Independence Lode, a conflicting mining claim, and the said suit is now pending in the Circuit Court of the United States for the District of Colorado; that the right of said corporation to hold said mining claim depends, among other things, on its right, as a corporation, to locate the same.

J. G. POHLE,

Subscribed and sworn to before me this fourth day of October, A. D. 1886.

[*Notarial Seal.*]

LIVINGSTON D. SMITH,
Notary Public (*No. 285*),
New York County.

EXHIBIT 6.

AFFIDAVIT SURVEYOR-GENERAL OF UNITED STATES FOR COLORADO.

STATE OF COLORADO, } ss.
County of Arapahoe. }

James A. Dawson, being first duly sworn according to law, deposes and says that he is the Surveyor-General of the United States for the State of Colorado, and as such, as well as personally, is acquainted with the manner and modes in which mining for gold and silver bearing ores is carried on in said State. That affiant verily believes that an early decision of the question of the right of a corporation, organized under the laws of any State or Territory of the United States, to locate lode mining claims, is a question of very general interest and grave importance to many citizens of the State of Colorado, as well as of other States and Territories of the United States, for the following reasons, to-wit: That a decision has recently been rendered by the Circuit Court of the United States for the District of Colorado, to the effect that such locations cannot be made; that many such locations have heretofore been made and have gone through the local land offices of the United States and the office of the Surveyor-General and the General Land Office of the United States, at Washington, without question, and patents based on such locations have been issued; that many corporations organized for the purpose, among others, of acquiring title to mining claims by location, have been formed and are now in existence, and are from time to time being formed; that knowledge of said decision, as well as of the previous practice of the Government, is general, and is calculated to create alarm and doubt among the owners of mining claims so located, as well as to deter companies and persons from making or causing to be made similar locations, until the question is finally decided by the Supreme Court of the United States. JAS. A. DAWSON.

Subscribed and sworn to before me this fourth day of September, A. D. 1886. JESSE C. BALL,
[*Notarial Seal.*] *Notary Public.*

EXHIBIT H.

LETTER COMMISSIONER GENERAL LAND OFFICE.

Vol. 58, p. 342. 1886—31582. C. A. H.
Refer in reply to this initial: J. F.
N.

Department of the Interior, W. O. C.
General Land Office, F. G.
WASHINGTON, D. C., May 4, 1886.

A. B. MCKINLEY, Esq.,
51–54 Barclay Building, Denver, Colorado:

Sir—In reply to your letter of the 13th M'ch, asking whether there have been any decisions of this department upon the question whether a corporation can locate a mining claim or join in such a location, you are referred to Secs. 2319, 2321 and 2325 U. S. Revised Statutes, found on pages 3, 4 and 5 of the enclosed U. S. Mining Laws and Regulations Thereunder.

You are futher advised that this office has never questioned the right of a corporation, organized under the laws of the United States or of any State or Territory thereof, to locate or join in the location of a lode or placer mining claim.

Very respectfully,

WM. A. J. SPARKS, *Commissioner.*

EXHIBIT I.

LETTER OF THE COMMISSIONER OF GENERAL LAND OFFICE TO THE SECRETARY OF THE INTERIOR.

J. McM.
J. T. S.

UNITED STATES OF AMERICA,

Department of the Interior,

WASHINGTON, D. C., Aug. 30, 1886.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed letter is a true copy of a paper now on file in this Department.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written. H. L. MULDROW,

{ *Seal Department of the Interior.* } *First Asst. Secretary of the Interior.*

S. M. L.

Department of the Interior, D. E. F.

General Land Office. J. T. W. W. O. C.

WASHINGTON, D. C., July 31, 1886.

HON. L. Q. C. LAMAR,
Secretary of the Interior.

SIR:—I am informed that the case of Alexander B. McKinley vs. Jerome B. Wheeler and Clinton Markell, now pending in the Supreme Court of the United States, involves a question as to the right of a corporation to locate a mining claim. The present rule of this office in adjudicating mining cases is not to question such locations. The Circuit Court of the United States for Colorado, in the case above mentioned, decided adversely to the corporation, and a question is thus raised of very great and general interest to the mining States and Territories, where, I understand, such locations are now common. Mineral entries, based upon such locations, are now in this office awaiting action.

As the question is one involving the proper administration of this office, I have to suggest that, if in your judgment such a course is advisable, the Attorney-General of the United States be requested to procure, if possible, early action in the above case.

Very respectfully, WM. A. J. SPARKS,
Commissioner.

EXHIBIT J.

LETTER OF THE SECRETARY OF THE INTERIOR TO THE ATTORNEY-GENERAL.

United States of America.—Department of Justice.

August 19th, 1886.

Pursuant to the Act of Congress of February 22, 1849, I hereby certify that the annexed paper is a true copy of the original letters of July 31st and August 5th, 1886, on file in this office, addressed to the Attorney-General by the Secretary of the Interior.

In witness whereof, I have hereunto set my hand and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

G. A. JENKS,
Acting Attorey-General.

[*Seal Department of Justice.*]

5805—86. V. B.

Department of the Interior,

WASHINGTON, July 31st, 1886.

HON. A. H. GARLAND, *Attorney-General:*

SIR—Herewith I transmit letter from the Commissioner of the General Land Office in relation to a case now pending in the United States Supreme Court, on appeal from the U. S. Circuit Court for Colorado (McKinley vs. Wheeler and Markell).

The questions involved in said case are of grave importance in the administration of the Land Department, and I have the honor to request that you will act upon the suggestion of the Commissioner, and endeavor to have the case advanced upon the docket of the Supreme Court and obtain its early action thereupon.

Respectfully,

L. Q. C. LAMAR, *Secretary.*

E. T. B.
5820—'86.

Department of the Interior,

WASHINGTON, August 5, 1886.

HON. A. H. GARLAND, *Attorney-General:*

SIR—I have received your letter of July 31st last, in reference to the advancement on the docket of the case of McKinley vs. Wheeler and Markell, now pending in the Supreme Court of the United States on appeal from the Circuit Court of the United States for the District of Colorado. In reply to your letter, I desire to state that it is my wish that a motion should be made to advance this case, as I deem it a matter of public interest, involving a correct administration of the Land Department in reference to the issues therein involved.

Very respectfully,

L. Q. C. LAMAR, *Secretary.*

D. L. H.

"MOTION TO ADVANCE.

"These motions are granted and the cases are set for argument "at the foot of the day calender for the 14th day of March next. The "Attorney-General will be heard on the public questions involved if "he desires.

"[Endorsed.]

"Sup. Ct. U. S., 1880. Oct. Tm. Nos. 458 and 459. 458 St. L. "S. & R. Co. vs. Kemp et al., and 459 same vs. Ray et al. Order of "Court granting motion to advance, etc. Filed 24th Jany., 1881."

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ALEXANDER B. McKINLEY, *Plaintiff in Error.* vs. JEROME B. WHEELER AND CLINTON MARKELL, *Defendants in Error.*	*Error to the Circuit Court of the United States for the District of Colorado.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Plaintiff in error brought this action in the Circuit Court for the recovery of the possession of an undivided one-half interest in the Vallejo lode mining claim, said mining claim being in the Roaring Forks mining district in the County of Pitkin and State of Colorado. In his complaint, filed July 31, 1885, he alleged that on the eleventh of March, 1884, and thereafter, he was the owner of an undi

vided one-half interest in said mining claim and that he claimed the right to occupy and possess the premises by virtue of a compliance with the local laws and rules of miners in said mining district, the laws of the United States and of the State of Colorado, by himself and his grantors ; that said mining claim was discovered and duly located on the public domain by the Josephine Mining and Prospecting Company, James W. McGee and Charles Miller, and the interest of plaintiff was vested in him by purchase and conveyance from the Josephine Mining and Prospecting Company. The complaint then set out a description of the mining claim by metes and bounds, as contained in the original location certificate and alleged that defendants on October 20, 1884, and since, had wrongfully excluded plaintiff from any possession of said premises and his interest therein. A second count contained the same averments except that it set out the description contained in an amended location certificate for said mining claim made by the defendants and one Hewitt on October 11, 1884 ; and the complaint prayed a recovery of the possession of an undivided one-half interest in said mining claim, under both descriptions by metes and bounds.

A demurrer was interposed by both defendants setting forth various formal objections to the complaint, and in addition this cause :

"*Fifth.*—Because the plaintiff bases his title or "claim of ownership to an undivided one-half of the

"said Vallejo lode mining claim upon a purchase and "conveyance thereof from the Josephine mining com- "pany, a locator of said claim, and that said company, "whether a corporation or partnership, was and is "incapable of originally locating a mining claim, in "whole or in part, under the statutes of the United "States or of the State of Colorado."

This demurrer, after argument, was on January 4, 1886, sustained on said fifth paragraph, that is to say, on the ground that a corporation could not locate or join in the location of a lode mining claim on the public domain of the United States, under the laws of the United States, and that therefore the act of the Josephine Mining and Prospecting Company in attempting to join in the location of the Vallejo lode claim was wholly ineffectual and void, that it acquired no right, title or interest thereby, and that nothing passed by its conveyance to plaintiff in error.

Afterwards, on January 18th, in anticipation of a writ of error to this Court, to review said judgment, plaintiff was allowed to amend his complaint, so as to more formally present this question, and on the twentieth of January the same demurrer was, without argument, sustained as to said amended complaint, and judgment entered for defendants.

The amendment to the complaint was in a paragraph numbered V in each count of the complaint, in the words and figures following:

"That the said the Josephine Mining and Pros-
"pecting Company, the grantor of plaintiff and one
"of the locators of said lode mining claim as afore-
"said, was, at the time of the said location of said
"lode mining claim, a corporation duly organized and
"existing under and by virtue of the laws of the State
"of Colorado for the purpose and object of prospect-
"ing for valuable mineral deposits on the public do-
"main of the United States within said State and of
"mining valuable minerals in said State.

"That each and all of the incorporators of said
"corporation, and each and all of the members
"thereof, at the time of the location, were citizens of
"the United States of America, severally and individ-
"ually qualified and competent to enter upon the
"public domain of the United States and acquire title
"to the public mineral lands by discovery and loca-
"tion, as provided by act of Congress, and said cor-
"poration did, by and through its agent, the superin-
"tendent of said company, enter upon the public
"mineral domain of the United States, and, together
"with the said McGee and Miller, discover and locate
"the said Vallejo lode mining claim, the said location
"being made in the name of Miller, McGee and the
"Josephine Mining and Prospecting Company, the
"discovery and location being for the use and benefit
"of, to-wit, Miller and McGee one-half, and the mem-
"bers of said corporation one-half."

Assignment of Error.

The Court erred in sustaining the defendants' demurrer to the plaintiff's amended complaint and in entering judgment for the defendants upon said demurrer.

Brief and Argument.

The sole question presented in this case for the decision of this Court is whether or not a domestic corporation, a corporation organized under the laws of one of the States or Territories of the Union, can go upon the public domain of the United States, discover and locate lode mining claims containing valuable mineral deposits, in like manner and with the same authority as individuals, citizens of the United States, may discover and locate such deposits and claims.

The right, if it exist, will be found in the enactments of Congress. If such right be granted and given by the acts of Congress, it will scarcely be contended that it is or can be abridged or taken away by a State statute or any local rule or custom; and on the other hand we do not claim the right exists unless it can be found to rest on the authority of a statute of the United States; that is, that it is expressly conferred by, or is fairly included within, such statutes.

The public lands of the United States, containing valuable mineral deposits, equally with those lands valuable only for agricultural purposes, are to be disposed of from time to time in such ways as may be directed by Congress.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Sec. 3, Art. 4, Const. U. S.

But with respect to these two classes of lands, agricultural and mineral, widely different interests and purposes on behalf of the people, to whom the lands belong, were and are to be served. In the one case the lands are supposed to be valuable for themselves as they are found, and in disposing of them, under a well settled policy, the government is to serve the double purpose of providing homes for its citizens and of settling and improving waste lands. In this plan a corporation has no place. Not so with respect to mineral lands. Here are barren mountain sides, rocky and worthless lands as a rule, but containing valuable minerals implanted and hidden in the earth.

The act of May 10, 1872, hereafter referred to and being the present mining statute, was introduced into Congress by bill entitled, "An act to *promote the development* of the mining resources of the United States."—P. 2457, *Cong. Rec.* 102, part 3, March 19, 1872. And see, Title of Act 17 Stat. at Large 91. In the case of Heydenfeldt vs. Daney gold mining company, 3, Otto 638, this Court says: "It has been the settled policy of the government to promote the development of the mining resources of the country."

To extract these minerals, therefore, and add this wealth to the common wealth of the country, is the policy of the government, and whatever instrumentality, within the resources of the country itself, will produce this wealth and add it to the common stock, may properly, within the spirit of that policy, be availed of; and as such extraction and production is oftener than not attended with large expense, an association or aggregation of persons and their combined contributions of capital, would seem, in theory, to further the purposes and objects to be served with regard to these lands. Hence, if such aggregation of effort and capital should take the form of a corporation—so long as it is a domestic corporation, thereby receiving and distributing such wealth in the United States, to whose people it belongs—there would seem to be no good reason on principle for withholding from such corporation any right granted to or conferred upon the individual citizen.

Now, the question is presented, how does this policy appear to be recognized by Congress, and has it given it the sanction of law?

The Vallejo was located in 1880, and the location was made under the said act of May 10, 1872. 17 U. S. Stat. at large, p. 91, section 2318 *et seq.*, Revised Stat. U. S.

Section 2319, R. S. U. S., is as follows:

"All valuable mineral deposits in lands belong-
" ing to the United States, both surveyed and unsur-

"veyed, are hereby declared to be free and open to "exploration and purchase, and the lands in which "they are found to occupation and purchase, by citi- "zens of the United States and those who have de- "clared their intention to become such, under regula- "tions prescribed by law, and according to the local "customs or rules of miners in the several mining "districts, so far as the same are applicable and not "inconsistent with the laws of the United States."

It will doubtless be contended by counsel for defendants in error, as it was in the argument in the Circuit Court, that a corporation is not expressly named in this section, and that under the decision in Paul vs. Virginia and under other cases, it is not, technically, a *citizen*. No part of this do we assert, but we do submit, with some confidence, that taking the whole act of Congress together, the intention is clear and plain to confer the right to explore, occupy, purchase and obtain title by patent, on domestic corporations.

The case of Paul vs. Virginia (8 Wall.) simply decided that a corporation was not a citizen of the United States within the meaning of that provision of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. Yet in this same case this Court repeated what it had theretofore in other cases held, that for the purposes of jurisdiction in Federal Courts, corporations would be treated as citizens of the States

wherein they were created, and this so conclusively that all members thereof would be presumed to be citizens of such State without special averment thereof, and such presumption could not be controverted.

Again, in defining the terms used in the revised statutes, Chapter 1, Section 1, R. S., states, among other things, that the word "person" may extend to and be applied to partnerships and corporations. Here are two express recognitions of the proposition that within the meaning of the statutes of the United States corporations may be included under the names "citizen" and "person," one by this Court and one by Congress.

Now with reference to these locations Congress was not restricted to "citizens" as meaning natural born persons. Under the Constitution, as has been seen, the disposal of these lands rested with Congress without limitation. It had the *power* to include corporations among those who might make these locations and entries. The inquiry then is not to what extent a corporation is in law a "citizen," but whether *Congress intended* to include domestic corporations among those who could acquire mineral lands by location and patent. It seems clear that it did.

Section 2321, R. S. U. S., says:

"Proof of citizenship, under this chapter, may "consist, in the case of an individual, of his own affi- "davit thereof; in the case of an association of per- "sons unincorporated, of the affidavit of their author-

"ized agent, made on his own knowledge, or upon "information and belief; and in the case of a corpor- "tion organized under the laws of the United States, "or of any State or Territory thereof, by the filing of "a certified copy of their charter or certificate of in- "corporation."

To what does this citizenship refer? Is it not a definition of the use of the word "citizen" in section 2319, as much as though after the word "citizen" the first section had contained the words, "and associations of persons unincorporated and corporations organized under the laws of the United States, or of any State or Territory thereof, shall be taken and held to be citizens of the United States within the meaning hereof."

But if any doubt of such intention of Congress could exist after consideration of these sections, it must be set at rest by section 2325, R. S.:

"A patent for any land claimed and *located* for "valuable *deposits* may be obtained in the following "manner: Any person, association or *corporation* "*authorized to locate a claim under this chapter*, hav- "ing claimed and located a piece of land for such pur- "poses, who has, or have, complied with the terms of "this chapter, may file in the proper land office an ap- "plication for patent, under oath, showing such com- "pliance, etc., etc."

Here is an express and the most explicit recognition of the right of a corporation "to locate a claim under this chapter." The proposition is so plain as

scarcely to admit of argument. The section assumes and in a manner asserts that in the same chapter the right has been conferred on a corporation to locate land for valuable deposits, and turning back we find this authority thus referred to in section 2319, explained by or construed in connection with section 2321.

Section 2333 again recognizes a corporation as being in possession, under authority of said statute, of a lode mining claim. It will be observed that wherever, in this statute, the classes are enumerated, the general term "citizen" particularized, so to speak, corporations are among the enumerations.

It would therefore appear, in contemplating the whole statute, as must, of course under principles of statutory construction be done, that Congress has therein clearly and expressly conferred upon corporations organized under the laws of the Unted States, or of any State or Territory thereof, the right to locate and proceed to patent upon valuable deposits in lode mining claims. And this intention would seem so manifest and plain as to render superfluous further argument. We have but to consider the policy of the Government with reference to the development of its mining resources, and then apply to this statute such well established principles of construction as will at once recall themselves; among others, that the whole statute must be considered together to ascertain its meaning; that the word "citizen" being

susceptible of different meanings (e. g.—corporations, for jurisdictional purposes, natural born persons, under certain Constitutional provisions) we should understand and apply it as used in its definite sense in section 2325, "any person, association or corporation authorized, etc."; "that if it can be prevented, no clause, sentence or *word* shall be superfluous, void or insignificant," (6 Bac. Abr. tit. Stat. 1, p. 380; Sec. 2; 16, N. J. L., 293); that being last in order of time, the enumeration or definition in section 2325 as to who may locate, has a certain preference; these and other principles and considerations applied to this act of Congress clearly support the construction contended for by plaintiff in error.

The only case reported, so far as known, where the statute, as relating to the use of this word "citizen" is in anywise applied, is that of the North Noonday Mining Company vs. The Orient Mining Company, 6 Sawyer, 299. The syllabus of that case states:

"1. Only citizens can locate mining claims. "Under the act of Congress of May 10, 1872, re- "lating to the public mineral lands, none but citizens "of the United States and those who have declared "their intention to become such, can acquire any "right to such lands by location."

And again:

"16. Corporation, when deemed a citizen. "A corporation organized and existing under the "laws of California, is to be deemed a citizen in the "sense of the act of May 10, 1872."

This case was decided March 4, 1880. It is quite an exhaustive case on many matters under the statute, but on this particular point is quite brief; but there was apparently an assumption the statute was quite plain in this respect. The East Noonday North lode claim was located (p. 315) November 27, 1877, by individuals, one of whom was an alien, not qualified to locate, and the principal question was whether this made the location invalid as to the others, who were citizens. The Court held not, and said: "If, therefore, one or more of these locators "were citizens, and the claim was in other par- "ticulars well located, and the proper conditions "performed to hold the claim till the subsequent "conveyance to plaintiff, November 20, 1878, a "good title thereto as against defendant passed "to the North Noonday Company, plaintiff, by "that conveyance." Then, with respect to the citizenship of the corporation and its right to take and hold possessory title to this lode claim, the fee to which was still in the United States, the Court says: "The North Noonday Company, plaintiff, "is a corporation, created and existing under the "laws of California, and is, therefore, to be deemed "a citizen within the meaning of the statute, and as "such is competent to purchase and hold a mining "claim."

True, this was not a case where the corporation had *located*, and it is not expressly stated that the corporation was qualified to locate, as well as pur-

chase and hold,—apparently, because no necessity for such statement arose in that case. But the broad and unqualified statement is made that this corporation, organized under the laws of California, *is to be deemed a citizen within the statute*, the right to purchase and hold merely flowing from that status; and it is to be observed the Court, in the very same charge, had previously stated that none but *citizens* and those who had declared their intention to become such, could acquire rights by location under this act of May 10, 1872, and the effect of others than citizens taking and holding mining claims was the principal question before the Court in that case; so that this statement is not to be regarded as a mere *dictum*.

From the foregoing considerations of the statute as well as what support such construction finds in the North Noonday case, the proposition of plaintiff would seem to be well established. But it may be well to notice other matters in this connection.

It may be contended, in view of the fact that sections 2325 and 2321 together must, perforce, be admitted to at least allow corporations to proceed to patent—that corporations may acquire the inchoate and incomplete right of an individual acquired by discovery and location, and with this interest, after further compliance, proceed to patent. This view has been urged. We submit it is wholly untenable. In the first place there is no evil or supposed evil, abuse or undesirable result that could possibly flow

from the act of discovery and location and subsequent patent by a corporation that would not be as certainly present or resulting from such construction and procedure.. A corporation could procure an individual to make the location and immediately acquire his rights, and thereafter proceed to patent or not, at will. So, if it be said locations by corporations are inconsistent with the intent of section 2319 to confer these rights solely on citizens and those intending to become such, because others than citizens might be members of such corporation, the answer at once suggests itself that for the reasons last given the same danger or evil, if such it be, attends the right, if so much be conceded, of a corporation to acquire a location by purchase and proceed to patent under section 2325. And if such right, at least, be not conceded no effect at all can be given to parts of sections 2321 and 2325, referring to corporations, which would violate all rules of construction.

But this argument that aliens, by incorporating under state laws, could thus subvert the spirit of the law, in either case of location, or purchase after location, is not a fair one. This is a matter that can safely be left to Congress and the States, whose creatures these corporations are. It can fairly be presumed, in all cases, that the members of the corporation are citizens of the sovereignty under whose laws it is created, as is now done for purposes of jurisdiction.

But aside from that, whatever right or practice

there might or may be, of corporations acquiring locations from others and proceeding to patent, a different course was evidently in contemplation of Congress. The statute was designed as an harmonious whole and complete in itself. This is apparent on its face, and it was stated in the debate in the Senate of the United States on the bill for this act, that it was the first attempt to codify these mining laws.

Cong. Rec., p. 2547.

It was evidently in contemplation and intended that the same individual, association or corporation should go upon the public domain, explore, locate and thereafter proceed to patent and obtain from the United States the fee for the land upon which his or its discovery and location was made. And if this view be adopted, the right at least to proceed to patent being apparently conferred upon corporations beyond cavil, by section 2325, the right relates back to discovery and location, and the corporation may do all of the acts. It is true that Courts have recognized in, or given to, the possessory right following location, a species of property, a proper subject of alienation, and therefrom, perhaps, has sprung whatever there is in practice of purchase of locations by individuals or corporations from the original locator, and proceeding to patent by the purchaser.

This Court in the case of Sparrow vs. Strong, 3 Wall, on p. 104, took cognizance, after objection to the jurisdiction, of a case from Nevada growing

out of the product of a mining claim to which claim there was no title out of the Government and in doing so used this language: "We know also that the Territorial Legislature has recognized by statute the validity and binding force of the rules, regulations and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the National Government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country."

Such and like recognition of the intermediary and possessory right, between location and patent, as a species of property, gave rise to the alienation of this right and doubtless in many cases the patentee is a purchaser from the locator or some grantee of the locator. On this fact and the fact that in the act of 1866, or the amendment of 1870 no mention was made of corporations, while in the act of 1872 the first reference to corporations is in the section relating to proceedings to obtain patent (Sec. 6 of act) is based the argument in favor of defendant's demurrer that notwithstanding similar or any evils may result from purchase after location by corporation, as well as from location, as heretofore shown, nevertheless, it appears that the *intent* of Congress to recognize such procedure is thus shown by these

various considerations. We confess that this argument seems to us to be exceedingly fine-spun, and we submit it is impossible to find any warrant for such conclusion in the statute of 1872. The only recognitions of miners rules or customs among them, in the act of 1872, are as to formal matters in making and recording location and doing development work; there is nothing which justifies the argument that Congress therein recognized any custom or rule going to this vital question of acquiring the property,—who might or might not do it. And if we are to go outside of the statute to find any notice of what was or was not the custom as to locations by corporations, it is very apparent, from the exhibits in the motion to advance. hereinafter referred to, that there was and is at least an equally prevalent practice of locations by corporations direct. And as to there being no mention of corporations in the act of 1866 or the amendments of 1870, that is not strange, for the former was a very incomplete act and there was no occasion for mention in the amendments of 1870, which only extended the act to placers.

The act of July 26, 1866, was entitled, "An act "granting the right of way to ditch and canal owners "over the public lands, and for other purposes," and the only procedure provided for obtaining patent was in section 2: "That whenever any person or asso- "ciation of persons claim a vein or lode of quartz or "other rock in place, etc., it shall and may be lawful

"for said claimant or association of claimants to file "in the local land office a diagram of the same, so "extended laterally or otherwise as to conform to "the local laws, customs, and rules of miners, and "to enter such tract and receive a patent therefor"

The act of July 9, 1870, was entitled, "An act "to amend an act granting the right of way to ditch "and canal owners over the public lands, and for "other purposes," and began at section 11, where the original act left off, and added sections 12, 13, 14, 15, 16 and 17, relating to placers. Section 12 being in words, "That claims usually called 'placers,' "including all forms of deposit, excepting veins of "quartz or other rock in place, shall be subject to "entry and patent under this act under like circum- "stances and conditions and upon similar proceed- "ings as are provided for vein or lode claims."

Then comes the act of 1872, adding to, taking from and rearranging the previous acts, and embodying the references to corporations heretofore noted.

If there were any foundation for this position of defendant in error, why does Section 6, referring to patents, use this language, "Any person, association or corporation *authorized to locate* a claim under this chapter, *having claimed and located*, etc.," if a *corporation could not* claim and *could not* locate anything under said chapter. Can it be contended for a moment that Congress would employ such language to convey

such opposite meaning as imputed to it by defendant?

But a further consideration of these statutes affords some light with respect to this argument that Congress intended, by the reference to corporations in the act of 1872, simply to recognize a supposed custom, then in vogue among miners, of corporations acquiring the locator's title and proceeding to patent. The first section of the act of 1866 was, "That mineral lands of the public domain, both sur- "veyed and unsurveyed, are hereby declared to be "free and open to exploration and occupation by "all *citizens* of the United States and those who "have declared their intention to become citizens, "subject to such regulations or rules of miners in "the several mining districts, so far as the same may "not be in conflict with the laws of the United "States."

It will be noticed in the first place, this statute simply refers to "citizens;" the second section, heretofore cited, uses the expressions "person or association of persons," and "claimant or association of claimants;" there is no further definition of or reference in that act to the word "citizen," and no allusion whatever to "corporations" in terms. The amendatory act contains no reference to or definition of the word "citizen" or any allusion to corporations. But the act of May 10, 1872, with reference to proof of citizenship, as found in 17 stat. at large, 91, is as follows: "Proof of citizen-

"ship under this act, *or the acts of July twenty-sixth,* "*eighteen hundred and sixty-six, and July ninth,* "*eighteen hundred and seventy,* in the case of an in- "dividual may consist of his own affidavit thereof, "and in case of an association of persons unincor- "porated of the affidavit of their authorized agent, "made on his own knowledge or upon information and "belief, and in case of a corporation organized under "the laws of the United States, or of any State or Ter- "ritory of the United States, by the filing of a cer- "tified copy of their charter of incorporation." This section is the same as is incorporated as Sec. 2321 in Revised Statutes, save the italicised words. Now is it not clear that if Congress had provided this mode of proof for corporations, and had made reference to corporations, simply with respect to their obtaining patent, in accordance with a custom of miners which had then come into existence, it would have confined the application of this provision for proof to the act it was then passing? But instead of that it refers specially also, to the acts of 1866 and 1870, which contained no reference to corporations, but only to "citizens" generally, thus providing for proof of citizenship of a domestic corporation under a statute using only the word "citizen," and containing no distinction between the right of location and the right to patent. And again, there is as full a recognition of miners' rules and customs in the former acts as in that of 1872, thus destroying the argument

that in the latter act Congress was recognizing to any greater extent such rules and customs.

The argument finds no support in the statute itself, to which we must look for guidance. It is quite clear this act was an attempt, and the first attempt, at codification of these mining laws by Congress, as was stated in the Senate proceedings heretofore cited in the *Congressional Record* (p. 2457); and the words "and purchase" were added to section 1, so as to show that citizens could acquire permanent title as well as right of occupation; then the other sections were matter of procedure showing how those to whom the Government gave this right to go on the public domain, explore, occupy and purchase, should protect their rights and finally acquire title, and the references to persons, associations and corporations in these procedure sections simply show that all three were included and so intended to be in section 1 containing the grant of right and authority.

And in passing, I may perhaps say with propriety, that such would appear to have been the almost universal belief among persons residing in the mining States and Territories, where this statute receives practical application. In the motion to advance this cause made at the October term, 1886, printed copies of which are on file, several hundred such locations throughout the mining counties of Colorado are cited, besides a number of cases in California, Nevada, Montana, Wyoming and Ari-

zona, one at least in the latter as early as 1865. In addition to these the affidavits of the Surveyor General of Colorado and the Secretary of State of Colorado, and others, as well as the communications of the Honorable Secretary of the Interior and the Honorable Commissioner of the General Land Office of the United States, set forth in said motion, show this common acceptance of this construction of the statute, and the custom of locating *and* patenting by domestic corporations. It cannot perhaps, were it necessary, be argued, to the extent of insisting, that this construction has become a rule of property in such cases, inasmuch as, so far as known, the question has not heretofore been expressly adjudicated by the Courts. And yet when, in addition to the North Noonday Company case (*supra*), it is considered that a department of the Government, acting in a quasi-judicial capacity in ruling upon the validity of such locations, has admitted them to be valid and lawful, or at least has not questioned them in the past, and with such knowledge before them many mining corporations have made such locations, the question is presented in a light not very different from a rule of property.

In the letter of the Commissioner of the General Land Office, "Exhibit H," motion to advance, it is said, —

"In reply to your letter of the 13 March, asking "whether there have been any decisions of this de-

"partment upon the question whether a corporation "can locate a mining claim or join in such a location, "you are referred to sections 2319, 2321 and 2325, "U. S. Revised Statutes, found on pages 3, 4 and 5 "of the enclosed U. S. Mining Laws and Regulations "thereunder.

"You are further advised that this office has "never questioned the right of a corporation, organ- "ized under the laws of the United States or of any "State or Territory thereof, to locate or join in the "location of a lode or placer mining claim."

And in letter, "Exhibit I," the Commissioner says:

"I am informed that the case of Alexander B. "McKinley vs. Jerome B. Wheeler and Clinton "Markell, now pending in the Supreme Court of the "United States, involves a question as to the right of "a corporation to locate a mining claim. The present "rule of this office in *adjudicating mining cases* is not "to question such locations, etc., etc."

These exhibits show the uniformity of the rule so far as the Interior Department since 1872 has announced it to the public. And in this connection may be cited 1 Kent Comm., p. 531:

"Lord Mansfield frequently observed, that the "certainty of a rule was often of much more impor- "tance in mercantile cases than the reason of it, and "that a settled rule ought to be observed for the sake "of property; * * * The English "Courts seem now to consider it to be their duty to

"adhere to the authority of adjudged cases, when "they have been so clearly and so often, or so long "established, as to create a practical rule of property, "notwithstanding they may feel the hardship, or not "perceive the reasonableness of the rule."

In Rogers vs. Goodman, 2, Mass., 475, in passing upon an early law of the colony authorizing freemen to dispose of lands, etc., the Court says: "Of "these statutes a practical construction early and "generally obtained that in the power to *dispose* of "lands was included a power to sell and convey the "common lands. Large and valuable estates are "held in various parts of the commonwealth, the "titles to which depend on this construction. Were "the Court now to decide that this construction is "not to be supported, very great mischief would "follow. And, although if it were now *res integra*, "it might be very difficult to maintain such a con- "struction, yet at this day the *argumentum at incon-* "*venienti* applies with great weight. We cannot shake "a principle which in practice has so long and so ex- "tensively prevailed. If the practice originated in "error, yet the error is now so common that it must "have the force of law. The legal ground on which "this provision is now supported is, that long and "continued usage furnishes a contemporaneous con- "struction, which must prevail over the mere tech- "nical import of words."

And this Court, in the case of Union Ins. Co. vs. Hoge, 21 How, 35, concerning the proceedings

and acts of the Insurance Co. under a statute of New York, says, (p. 66): "The practical construc-"tion of this act of 1849, by the public officers of "the State, including the Attorney General, who were "required to supervise the preliminary steps made "necessary to the organization of the company, and "to certify that it had conformed to the provisions "of the act, and the latter officers especially, that "the charter was in accordance with it, is deserving "of consideration. Under the construction thus "given numerous companies have been organized "with charters like the present, providing for cash "premiums, or premium notes, at the election of the "insured, and an extensive business of insurance car-"ried on in New York and several of the sister States; "and, although this practical construction cannot be "admitted as controlling, it is not to be overlooked, "and perhaps should be regarded as decisive in a "case of doubt, or where the error is not plain."

But whether or not the question of a rule of property has application, these instances, at least, serve to show the very general belief and practice based thereon to the effect that corporations not only could patent, but *locate* and proceed to patent. Large numbers of titles have been based on such locations, among and by a class of people recognized by Congress in this statute, namely, the miners, and a co ordinate branch of the Government acting on such construction of the legislative intent, has approved such locations for a series of years, re-

ceived the monies for such entries and granted the fee for, such lands and this fee doubtless, in many cases, has been alienated and vested in still different persons or corporations. This reference will be permitted, perhaps, when it is considered that the evidence of these facts before the Court, although *ex parte*, is of such high character, and in the further view, that what we find to be the custom among miners in this behalf, especially during or before 1872, may throw some light on the inquiry as to what was the intent of Congress.

And this brings us to another question bearing upon the proposition before the Court,—that of contemporaneous construction of a statute by a department, or head of a department, whose duty it is to construe and give application to the particular law.

The Courts have gone very far in this direction, and with great uniformity, and all agree that such contemporaneous construction is entitled to great respect and that Courts will not overturn it or set it aside except for the most cogent reasons; and in some cases it has been held, that where the statute is at all ambiguous, a contemporaneous construction by an executive department will, after long acquiescence, and without interference by the legislative department, and especially where the construction has become the basis of a uniform course of action by the public, receive and be given the effect of positive law; and this, even though were it *res integra*, as

stated in the Massachusetts case, a different construction might or would be given.

This Court has passed on this question of contemporaneous construction in a large number of cases, and we will content ourselves with a citation of a few of the more recent ones:

In United States vs. Hill, 120, U. S., 169, concerning a statute relating to fees, a certain construction had been given, and practice sanctioned by the District Judge and Treasury officials. The statute being called in question the Court said:

"With this long practice, amounting to a contemporaneous and continuous construction of the "statute, in a case where it is doubtful whether the "statute requires a return of the disputed fees, "judges of eminence, heads of departments, and "accounting officers of the Treasury having con- "curred in an interpretation in which those con- "cerned have confided, the surety in the present "bond, as well as the principal, had a right to rely on "that interpretation in giving the bond; * * * * "In Edwards' Lessee vs. Darby, 12 Wheat., 206, "210, it was said: 'In the construction of a doubt- "ful and ambiguous law, the contemporaneous con- "struction of those who were called upon to act "under the law, and were appointed to carry its "provisions into effect, is entitled to very great re- "spect.' To the same effect are United States vs. "Dickson, 15 Pet., 141, 145; United States vs. Gil- "more, 8 Wall, 330; Smythe vs. Fiske, 23 Wall,

"374, 382; United States vs. Moore, 95 U. S., 760, "763; United States vs. Pugh, 99 U. S., 265, 269; "Hahn vs. United States, 107 U. S., 402, 406; and "Five Per Cent. Cases, 110 U. S., 471, 485. In the "case of Brown vs. United States, 113 U. S., 568, "the same doctrine was applied, the cases in this "Court on the subject being collected, and it being "said, that a 'contemporaneous and uniform inter- "pretation' by executive officers charged with the "duty of acting under a statute 'is entitled to weight' "in its construction, 'and in a case of doubt ought to "turn the scale.' A still more recent case on the "subject is United States vs. Philbrick, *ante*, 52, "where this language is used: 'A contempora- "neous construction by the officers upon whom was "imposed the duty of executing those statutes is "entitled to great weight; and since it is not clear "that that construction was erroneous it ought not "now to be overturned.'"

The case of Brown vs. United States, 113 U. S. referred to in the last opinion, prefaces the remarks quoted in 120 U. S. with these words: "It must be conceded that were the question a new one, the true construction of the section would be open to doubt." And then after using the language quoted in 120 U. S., and referring to authorities, concludes: "These authorities justify us in adhering to the construction of the law under consideration adopted by the Executive Department of the Government, and are conclusive against the contention of appellant,

that § 23 of the act of August 3, 1861, did not apply to warrant officers."

A still later case is that of Robertson vs. Downing, 127 U. S., 607, decided at the last October term of this Court, May 14, 1888. The case involved the construction of a statute which had received a practical construction by the Secretary of the Treasury. The Court said: "This construction of the "Department has been followed for many years, "without any attempt of Congress to change it, and "without any attempt, as far as we are advised, of "any other department of the Government to ques- "tion its correctness, except in the present instance. "The regulation of a department of the Govern- "ment is not of course to control the construction "of an act of Congress when its meaning is plain. "But when there has been a long acquiescence in a "regulation, and by it rights of parties for many "years have been determined and adjusted, it is not "to be disregarded without the most cogent and "persuasive reasons."

The rule is uniform and cases to the same effect might be multiplied. The foregoing however state the doctrine, and in the most recent cases, as laid down by this Court.

Now it is true no regulation or construction of a department has directly acted upon the case at bar. But we submit the principles enunciated in these cases may be invoked in behalf of plaintiff in error. There is sufficient evidence before the Court in this

case, did it not otherwise take notice of the facts arising from the law, Department regulations, rulings and practices. that the Interior Department,—charged with the execution of this act of Congress, to make regulations, etc.,,and issue patents for these mineral lands,—gave to the act a contemporaneous construction permitting locations by domestic corporations and holding them to be within the purview of the act.

In addition to "Exhibits H and I," motion to advance, heretofore referred to, "Exhibts B and C" may here be particularly referred to. "Exhibit B," the affidavit of the Register of the United States Land Office, Central City Colorado, says affiant was Register of that Land Office for seven years (1879); that applications for patents had been made at that Land Office, "the papers in which said applications showed that said lode mining claims were located, either in whole or in part, by corporations, which applications for patents on such locations were approved by him, and thereafter patents were issued for such lode mining claims." Said affidavit further shows that the records of said office do not show the number, etc., of such applications, all papers being forwarded to the General Land Office at Washington. Then, "Exhibit C," letter of Acting Commissioner of the General Land Office, states, "that there is no clerical force available for making a search of the records of this office to find how many patents have been issued

for mining claims located wholly or in part by corporations. Neither can persons, not officers of the bureau, be allowed access to the files for such a search as you suggest." It will thus appear that the full extent of this practice cannot be here shown to the Court, but it is before the Court that no different construction was at any time, since the passage of the act in 1872, put upon it by this Department

The plaintiff's grantor, a domestic corporation, relying upon this construction and practice of the Department, joined in the location of the Vallejo. Now, when its right to so locate is challenged on a construction of the statute opposed to that given by the Interior Department, and upon which latter construction it may be assumed to have relied, it and its assigns may fairly invoke in a Court of law that contemporaneous construction; and if it now appear that the statute itself is not free from ambiguity, the construction given by the Department, and on the faith of which corporations located, should control, and in the language of this Court, in 113 U. S., turn the scales in favor of this construction.

In the amendment to the original complaint it was alleged, as has been noticed, that the interest in the Vallejo lode here sued for, was located by the Josephine Mining and Prospecting Company, and that this company was organized and existing under the laws of Colorado, for the purpose of acquiring title

to mining property. It is then further alleged that each and every member of the corporation was a citizen severally and individually qualified under the laws to make such location. While this latter allegation will serve to show in strong colors the fallacy of any construction other than that here contended for, we do not especially rely on it as affording ground for reversal in this case any more than we do on the allegation alone of citizenship of the corporation itself. It would seem strange indeed, if a number of persons, all of them competent to make this location, could not through unison and the agency of this corporation do that which any or all could do for themselves. But we ask the decision of the Court fairly and fully on the question raised by the demurrer to the complaint; can this corporation, organized under the laws of one of the States of the United States, regardless of the citizenship of its members, locate a lode mining claim? Is not such a corporation, on bare showing of its corporate existence by its charter, as stated in section 2321, R. S., entitled to all the rights of location and patent guaranteed by said statute to natural-born citizens?

We have full faith in this proposition and submit that it is wholly unnecessary to go back of the charter and show that the members were citizens, severally qualified, as averred in the amendment. But were there any doubt as to the first proposition, there could not be as to the second. The act of Congress gives "citizens" the right to locate and

patent. It does not limit the form or manner in which two or more shall go upon the public domain, explore and locate. For aught contained in the statute they may go upon the ground and locate by an agent, and whether these two or more call themselves partners, an association or a corporation, whether they are bound together as to such interests by an agreement of partnership or association, or a charter, so long as they are *citizens* these matters are between themselves and do not affect their rights as citizens under the statute to make locations.

Again, the United States statute permits citizens to locate under regulations provided by miners' customs, local rules, etc., not inconsistent with the laws of the United States. As will be seen next hereafter the laws of Colorado authorize mining corporations to acquire title to mining property by location ; hence the right being conferred by Congress upon citizens, and the additional right, which is not inconsistent with the law of Congress, being conferred by the law of Colorado on these citizens to form a corporation, and through it acquire title by location, would furnish authority at all events in this particular case for the Vallejo location.

It is alleged in the complaint that there was a full compliance upon the part of plaintiff in error and his grantor company with the laws of the State of Colorado, as well as of the United States. As has been stated, the right to recover in this action

and the right of a corporation to locate is predicated on the statute of May 10, 1872, and not on any State law, local law or rule. However, in this case, the law of Colorado supports the view here taken.

Section 84 of chapter 19, General Statutes of Colorado, 1883, entitled "Corporations" says: "Any ore reducing, mining or tunneling company organized under the provisions of this act shall have the power to acquire, by *purchase or otherwise*, mining property and work, mine, tunnel and develop the same, etc., etc."

This, treated as in furtherance of the act of Congress, clearly gives the right to Colorado corporations to acquire public mineral lands by appropriation, i. e. by location. A corporation does not take by *descent;* the word "purchase" includes all other common law modes of acquiring title, hence acquiring "otherwise" must mean under the law by appropriation.

Hence, in this case, under the averment in the amended complaint that all the members of the corporation were citizens, the authority under the law of Colorado for this corporation to acquire title by location, and this latter provision not being inconsistent with the act of Congress, it would seem clear these citizens, through the means of this corporation, might avail themselves of their rights as citizens under the act of Congress to join in this location. But, as stated, we believe evidence that the corpora-

tion was organized and existing under the laws of Colorado to be sufficient proof of citizenship under the act of Congress.

We might prolong this argument by citing authorities having at least indirect bearing on views here presented, as well as to further analyze and compare the provisions referred to, but after all is said and done the question resolves itself into a construction of this act of May 10, 1872, and it is probable no further argument we can make will be of service to the Court or strengthen the position of plaintiff in error. It is believed, as the result of careful search as well as the admission of Court and counsel below, that the question has not heretofore been directly passed upon, at least by any Court whose opinions are of record. Plaintiff in error submits that this fact alone argues well for his position, as there has been no doubt expressed in a Court in some seventeen years of the construction of this statute, notwithstanding the many locations known to have been made. Again, it may be said, before closing, that the case at bar is important, not only because the mining claim involved is of great value, but because of the many other titles based on patents and location certificates, which will be directly affected by the result in this case.

Believing that those titles, as well as the title here in dispute, were based and founded on a true construction of the law, we rest our case with much

confidence that this Court will sustain our position.

Respectfully submitted,

HUGH BUTLER,

Attorney for Plaintiff in Error.

APPENDIX.

Believing that the proceedings of Congress afford information on the question whether or not in passing this Statute there was any additional recognition of miners' customs, and especially that claimed against us of corporations acquiring locators' titles and proceeding to patent, we have appended in form for the convenience of the Court, a brief history of the legislation resulting in the Act of May 10, 1872, consisting mainly of extracts from the *Congressional Globe.*

A bill was introduced by Mr. Sargent in the House of Representatives January 15th, 1872 as H. R. No. 1016, "to promote the development of the mining resources of the United States; it was read a first and second time, referred to the committee on mines and mining and ordered to be printed." (P. 395, *Congressional Globe*, Part 1, 2nd Sess. 42 Cong). On January 23d, the bill was reported back from the committee with the recomendation that it do pass. The bill was read and a full summary of its provisions will be found on page 532, same *Congressional Globe.* "In its first section it provides that all valuable mineral deposits in

lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and the lands on which they are found to occupation and purchase by all persons, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." "In its sixth section, it provides that a patent for any land claimed and located for valuable mineral deposits, may be obtained in the following manner: Any person, association or corporation having claimed and located a piece of land for such purposes, not exceeding in extent the area prescribed in this act, who has or have complied with the mining regulations, when any such exist at the place of location by the custom of miners, and with the terms of this act, may file in the nearest land office an application for patent, under oath, showing such compliance."

"Mr. Maynard: I desire to make inquiry of the gentleman from California (Mr. Sargent). This bill, so far as I am able to judge from the reading of it, seems to introduce a change in the policy of the Government with regard to mineral lands. I judge from its character that it is an important piece of legislation etc." * * * I wish the gentleman from California who certainly understands this subject, would oblige us, or some of us at least, by stating the reasons for these im-

portant changes. The House will vote more intelligently on the bill after such an explanation.

"Mr. Sargent: I will endeavor to explain the bill if gentlemen will give me an opportunity. The bill does not make any important changes in the mining laws as they have heretofore existed. It does not change in the slightest degree the policy of the Government in the disposition of the mining lands. * * * The changes made by the bill are principally those which relate to the legal question involved; in other words, to the application of the law so as to facilitate the miners obtaining their title in cases where heretofore their right to title has been recognized. * * * Now, sir, this legislation was originally an experiment. In 1866, when the original quartz law was passed, the question was fiercely debated whether it was worth while for the Government to sell the mineral lands of the United States. Some thought, or had some idea of a royalty belonging to the Government on some principle growing out of the constitutional right to regulate its coinage, it ought to keep control of the precious metals, etc. * * * Now, although the legislation of 1866 was extremely imperfect in the machinery, which since that time we have been trying to improve so that it may be easier for miners to avail themselves of the benefits intended to be conferred upon them by law, yet it showed to discoverers that that system was correct. * * * In 1870 * * * we

improved the machinery of the bill and extended the principle to Placer claims * * * The law is now going into general operation, We are inducing miners to purchase their claims, so that large amounts of money are thereby brought into the treasury of the United States, causing the miners to settle themselves permanently, to improve and establish homes, to go down deeper in the earth, to dig further into the hills and in every way to improve their own condition and to build up communities and cities where they reside.

This bill simply oils the machinery a little. It does not change the principle of the law; it does not change tenures; it simply provides the testimony shall be more easily taken, fees reduced and generally deals with matters of that kind."

The bill was then passed after third reading and sent to the Senate.

On April 16th, 1872 (Page 2456 Part 3, 2nd Sess 42d Cong) the Senate Committee on mines and mining reported "an amendment to strike out all after the enacting clause of the bill and in lieu thereof insert the following." Then follows in almost the exact words and in the same subdivisions, a bill the same as the statute of May 10th. 1872. The first section is the same as the present law, changing the House bill from "persons" to "citizens of the United States and those who have declared their intention to become such," retaining the language of the House bill at the beginning of

Section six, concerning patent to "any person, association or corporation," and adding to the end of the seventh section what was not in the seventh section or anywhere in the House bill,—"Proof of citizenship under this act, or the acts of July 26th, 1866 and July 9th, 1870, in the case of an individual, may consist of his own affidavit etc., etc." Being the same as is now found in the act of May 10th, 1872 in the 17 statutes at large, 91.

In the Senate, Mr. Stewart said: "With the consent of the senator who reported the bill, I wish to state that in the first instance miners legislated for themselves. Congress finally in 1866 passed a bill involving many of the principles of this bill and from that time to this the land office has been operating under it and for the last three years we have been attempting to codify and bring it into a shape that will be satisfactory and more certain and correct abuses. * * * Those familiar with mining rules have had a great many meetings over this bill in connection with the committee on mines and mining, and the result is a codification." After some trifling amendments the bill, as reported, was read a third time and passed. On April 17th, 1872, it was received in the House from the Senate (P. 2520) On April 29th, 1872 (Page 2897, part 4, 2nd, Sess 42d Cong) the bill as received from the Senate was discussed in the House. "Mr. Sargent said: The amendment which comes from the Senate is in the form of a substitute, yet the

variations from the bill as passed from the House are very trifling. I will say that the original bill was reported in this House unanimously from the committee on mines and mining and after an explanation was passed without a division. In the Senate, the committee on mines and mining and the delegates and members of the House from the mining Territories and States, aided that committee in perfecting the bill and improving its machinery. The bill is now entirely satisfactory to every delegate and every member from the mining States and Territories, as well as to the committee on mines and mining of this House. The substitute can be read at length if it be desired, yet the amendments are really merely verbal except as to one or two points upon which I can make an explanation."

"The House bill provided that "any person" might take up a mining claim. The Senate has struck out the words "any person" and substituted "any citizen of the United States or person who has declared his intention to become such." We are satisfied with that modification. Another amendment of the Senate reduces the length to which a quartz claim may extend from three thousand to fifteen hundred feet. We assent also to this. We are satisfied that a quartz lode of fifteen hundred feet will be perhaps as much as any company can profitably work. * * These are all the substantial variations of the Senate substituted from

the House bill and I ask that the amendments be concurred in." The substitute was read at length, (page 2898) the amendment of the Senate was concurred in, and the bill passed and the present statute enacted.

The remarks of Mr. Sargent concerning the change from "person" to "citizen" are all which are given in the *Globe* with respect to the question as to who may take up a claim; but these, in connection with the Senate amendments are significant. The original House bill provided that *any person* might explore and purchase these mineral lands and while providing that under that grant to *any person* that "any person, association or corporation" who might locate, might proceed to patent etc., contained no provision as to proof of citizenship. The Senate, while retaining the provision in section six, that any person, association or corporation authorized to locate might proceed to patent, changed section one so that instead of "any person," only "citizens" might locate and purchase, and added to section seven the provision of the present law, that proof of citizenship should consist in the case of an individual of his own affidavit. in the case of an association, of the affidaxit of the agent and in case of a corporation organized under the laws of the United States or any State or Territory thereof, of its charter or articles of incorporation. These amendments in section one and section seven it is manifest have relation one to the other. When the Senate struck out "person" and inserted "citizen," it added the further provision in explanation of its use of the word "citizen."

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, A. D. 1888.

ALEXANDER B. McKINLEY,
Plaintiff in Error,
vs.
JEROME B. WHEELER, ET AL,
Defendants in Error.

Brief for Plaintiff in Error in Reply.

HUGH BUTLER,
Attorney for plaintiff in error

C. J. KELLY, LAW PRINTER.

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A careful consideration of the points and arguments of counsel for the Aspen Mining and Smelting Company, made in behalf of defendants in error, will not, we respectfully submit, impair or lessen the controlling force of those considerations of the law urged in behalf of the plaintiff in error,

although counsel have so fully and with evident care and skill presented what may be said in support of their position.

It was urged principally, in our former brief, (1) that the policy of the Government in regard to these mineral lands, (2) a fair construction of the statute of May 10, 1872, with a view to ascertaining the intention of Congress therein respecting corporations, and (3) contemporaneous construction by the Executive Department of the Government—all favored the right contended for by the plaintiff in error. Counsel for defendants urge directly opposite views on each of these heads, and it may be profitable to briefly review their points thereunder.

With respect to the policy of the Government, counsel insist that it is as much a part thereof to promote the development of agricultural and other lands, including coal lands, as it is to develop these mineral lands; on the assumption apparently that it is equally the interest of the Government to give value to all its property. But the distinction we contend for is not the less true, that different conditions surround the two classes of lands. The one may be received from the Government as it is, and has value, and with the exception of some unfavored localities, needs naught but the ordinary improvements incident to use of private property to make it of value and worth the having. The other needs the co-operation of the recipient as well as the gift of the Government to render it of value. The Gov-

ernment gives the right of entry, and the recipient is "to develop." Webster defines "develop" "to free from a cover or envelop, to disclose or make known, etc.; *Syn.* to uncover, unfold, lay open, disclose, exhibit, disentangle, detect." 'Promoting the development,' as used in the title, of the Mining Act, and the decision in 3 Otto, has a definite and practical meaning, and is used in no general sense regarding the enhancing of values or the multiplication or enlargement of uses. It is significant as being used in connection with this class of lands, and not, so far as we are informed, with regard to others. The letter of Senator Stewart, in the appendix to defendants' brief, is authority for the statement that to add this wealth, so locked in the earth, to the wealth of the country requires the time, the labor and the capital of the producer often in extent and amount approximating the values produced.

And with these conditions existing the Government offers possessory right and title to those who in good faith so develop these resources; it is immaterial in this view and in the attainment of this end, whether the development be done by an individual, association or corporation—with the sole *proviso* that it be an association or corporation domiciled in this country; for of course it would be of little or no benefit to the Government or the people to have these resources developed by residents (whether citizens or corporations) of other countries and for their own use.

In "The Public Domain, its History, etc., 1883," prepared in pursuance of Acts of Congress, printed at the Government Printing Office, in the year 1884, on page 324, is found the following:

"The policy of the United States in relation to the sale and disposition of the mineral lands of the public domain—beginning with its reservation of portions of the metal therefrom, next occupancy rights, then leases, followed by public offerings and private entry and sale thereafter culminating in the several mining acts of 1866, 1870 and 1872—now permits their free exploration and development by citizens, or persons who have declared their intention to become citizens; and a nominal price for the lands (placer $2.50, and quartz, gold, silver, cinnabar, or other valuable deposit $5 per acre) is charged should the owner of the possessory title desire to procure a fee simple title. This price barely covers expenses of making title on the part of the United States. The material wealth added to the circulating medium by extraction from the earth through individuals or corporations, together with costs of mining and extraction, and the great and dangerous risks to fortune caused thereby, are considered equivalents for the value of the land. The United States protects exploration and developments by the miner on the public domain. As an evidence of the liberality of the nation in this respect, coal lands are sold at from $10 to $20 per acre. Twenty acres of coal land at $20 per acre cost the purchaser $400, while twenty acres of lode mineral land on the Comstock lode at $5 per acre are sold for $100 and, as in the case of the Consolidated Virginia and California mines, may yield more than $60,000,000."

II.

The statute itself: It being incumbent upon counsel to advance some explanation or argument

with reference to the use of the word 'corporations' in the statute, they urge, as was anticipated after the decision of the learned Court below, that the right to patent is thereby given, but no right to locate; the right to patent being in recognition of a custom asserted to have been then in vogue, of corporations acquiring locators' titles and holding possession thereunder. Counsel elaborates upon this argument, but before noticing the various details, it may be observed that there are one or two short sentences in the statute which in themselves completely overcome counsel's argument, to our mind, and these are passed over by counsel without explanation. It is argued the statute recognizes the right of corporations to patent but *not to locate.* Sec. 2325 tells how a patent may be obtained and *by whom.*

"Any person, association or corporation authorized to locate a claim under this chapter * * may file * * application for patent."

In the first place is a "corporation" elsewhere in said statute authorized to locate or intended to be included among those so authorized? If not, then a part of the language of said section is surperfluous—a construction which must, if possible, be avoided.

Next, *who may patent? Any person, association or corporation* (mark the qualification) *authorized to locate!* Clearly if there be no corporation *authorized to locate,* there is *no corporation* which

can obtain *patent.* Nowhere else is the right to obtain patent mentioned, and aside from the fact that we must find express authority in the statute we may apply the maxim quoted by defendant *expressio unius est exclusio alterious,* to this language, and we learn any corporation not authorized to locate cannot obtain patent. If no corporation can obtain patent, nor locate, the use of the words not only in this section but elsewhere in the act are rendered wholly superfluous. These words are so manifestly clear and unambiguous as to force their attention on even a casual reading of the statute; yet counsel content themselves with this reference—"and as we have already seen the phrase 'any person, association or corporation authorized to locate a claim,' etc., was originally incorporated in the House Bill and must be construed in connection with the express changes which were made therein by the Senate." (p. 15–16 def't brief.) But a perusal of the brief will fail to disclose any other direct reference to these words, or any explanation to controvert the proposition that such expressions are either utterly meaningless (as to corporations) or else that corporations *may* locate; or again, that this is the only authority for corporations patenting and this right (by this language) is limited to corporations *authorized to locate.*

But let us see what further counsel offers to support defendant's contention that Congress intended only to allow corporations to patent and not locate.

First—After quoting Senator Stewart, defendant says:

"This statement coupled with the reference which "section 7 makes to the acts of 1866 and 1870 clearly in- "dicates that it was intended to give to corporations which "had acquired mining claims from the locators thereof "prior to patent, to go forward and secure such patent if "desired." (P. 14.)

Second—Again (p 15) after citing authorities to show that the possessory title has been treated by this Court as property which a corporation could buy, counsel say, "Hence, since a corporation might buy before patent, it is given the right to complete title to the thing bought. This right is all it has under the statute."

Third—And again, on pages 16 and 17, counsel dwells on miners' rules and customs to show apparently the alleged practice which Congress sought to recognize of corporations buying from locators, and the absence of any custom of corporations directly locating.

We desire to call the Court's attention to the fact that counsel largely, if not wholly, *assume* the most important premise on which their deductions are founded, namely, the *custom* of corporations *purchasing* and holding possessory title, but *not* of *locating* and so acquiring possessory title. It is not shown by evidence, even of an *ex parte* character in this proceeding, or by decisions of Courts or records of the Interior Department or public history, or otherwise, that the custom was as asserted by

counsel; and to show that counsel's position in this respect is mere assertion, we reproduce whatever bears, in their brief, on this subject.

"We venture the assertion that no attempt was ever made prior to or under the acts of 1866 or 1870, to discover or locate a mining claim in the name of a corporation, or that if such attempt was made the records of the General Land Office give no account of it." (P. 10.)

"A desire to restrict the right to locate a mining claim to those who enjoyed it under the rules and regulations of miners." (P. 13.)

Further with respect to miners' rules and districts:

"It is safe to say that none of them, although scattered all over the Western States and Territories, contain a line which recognizes the right of a corporation to locate a mining claim."

"The meetings at which these codes were framed were not attended by authorized or other corporation agents, nor could the corporation vote on their adoption or rejection."

"There is not an instance, we venture to say, under these rules in these districts, where a location was ever made otherwise than by the miners or such of them as were citizens, native or naturalized."

"Since May 10, 1872, and up to the year 1885, eighty-one additional districts were formed, which adopted rules and regulations for their government. In none of these, so far as our examination has extended, are there any expressions indicating a recognition of the right contended for by the plaintiff in error." (P. 17.)

Not only will it be seen that these are mere assertions in which counsel may be entirely in error, but plaintiff, in his brief, makes reference to a contrary state of facts, as shown in the exhibits on

motion to advance this cause. This showing on behalf of plaintiff, although *ex parte*, professes to be the record evidence in part, and the rest the sworn statements of disinterested parties, some of them officials, presumably having knowledge, so they are certainly entitled to more weight than the mere surmises of counsel. Counsel insist that the Court will not base any conclusions on such showing, which is not a part of the record from the Circuit Court. It is of course to be regretted that the facts do not appear in such way as to have a less doubtful *status* in the discussion; but may we not fairly insist in return that defendants' contention—and one so vital in their case—is in an even less favorable light on this question of fact—being as it is without other support than the assertions herein reproduced? The learned Court below erred, as we respectfully submit, in its conclusions as to these customs, and there was naught of evidence before it to inform Court or counsel as to the true facts. And as we think the Court's conclusion, founded on a personal experience alone, has been here followed by defendant without additional support of any kind, while plaintiff, to meet the assumption thus injected in the case, has at least presented some evidence from disinterested and official sources; and this evidence in extent and character is such as to entitle it to at least some little weight whenever it comes in question in this discussion.

We submit, therefore, counsel fail to show there

was any custom in existence needing the recognition of Congress as contended.

As to corporations buying, after the Courts decided the possessory title was property, that is of no special significance, as it might exist in complete harmony with the further fact that other corporations were acquiring title by *location;* or again, the decision of the Courts is no evidence here, (but on the contrary there is a naked assumption by defendants) that only *thereafter* corporations acquired rights from locators and there became the necessity for provisions in the law such as claimed by defendant.

Counsel attaches significance to the reference to the laws of 1866 and 1870, in connection with proof of citizenship, saying as corporations could not locate under these acts, it is apparent proof of citizenship. applied only to proceedings to patent. Counsel says under these acts "corporations were powerless to locate claims;" may we not go further and say, according to counsel's own argument, that corporations were also themselves "powerless to obtain patent"—the latter right being first assured according to counsel by the act of 1872? Hence, the provision as to proof of citizenship was superfluous as to the acts of 1866 and 1870 so far as corporations were concerned, both as to location and patent. We should avoid this result; therefore, is it not more reasonable to conclude domestic corporations were not barred by the acts of 1866 and 1870, although not expressly men-

tioned; and Congress intended only to make perfect the machinery, and therefore, that as to locations made or then being made under the acts of 1866 and 1870, (before the new act in any wise superceded them,) the locator and patentee could, when thereafter necessary, show their citizenship in the same manner concerning rights claimed under these acts as under the new act thereafter to take effect.

III.

With regard to the aid to the construction afforded by the Congressional debate on the bill, it is not clear whether counsel concede that a corporation might have located, as the bill was originally introduced in the House. But counsel state, at least inferentially as we understand, that the words, "any person, association or corporation authorized to locate," which were in the original House bill and retained in the Senate substitute; had a significance in the original House bill which they did not retain in the Senate substitute; and these words now are either superfluous, or if not, then of little meaning, and exactly what is to be held as to them counsel does not venture a suggestion, as we have hereinbefore observed. In accounting for their presence now counsel say, (p. 13,) "With the exception of the clause at the end of section 7, regulating the method of proof of citizenship, that section together with section 6 and 11, as originally introduced, were incorporated in the Senate substitute, and it is quite probable that the *radical modifi-*

cation of section 1 was deemed sufficient to confine the right to locate to citizens alone. It is not surprising that these clauses should have been inserted in the House bill; they still appear, because the framework of that bill was used in the construction of the Senate substitute."

Now what was this "radical modification" and to what extent was the effect of these words destroyed thereby?

"In section 1 of the House bill the Senate struck out the words 'any person' and substituted 'any citizen of the United States and those who have declared their intention to become such.'" (Defendants' brief p. 11, 12, and p. 2897, part 4, *Cong. Globe*, 2nd Sess, 42 Cong.) The Senate retained section 6 as in the House bill: "Any person, association or corporation authorized to locate a claim under this chapter," etc; and added to section 7 (what is §2321 in the revised statutes.) "Proof of citizenship, under this chapter," etc.

Now why or wherein should the change from "person" to "citizen" in section 1, destroy the effect of the words in section 6, "corporation authorized to locate under this chapter?" If a corporation was included when the grant was to "persons," then when the change was made to "citizens" the most that could be said would be that the corporation, instead of being simply composed of "persons," must be composed of "citizens;" and this view (of individual citizenship of members,) might be urged

with some force, did not section 7 provide that citizenship may be shown by the charter of the corporation And again, if it be said "person" might include "corporation," (Sec 1, R. S., U. S.) while "citizen" cannot be so construed then we ask why did Congress not strike out the word "corporation" wherever it occurred, with its sponsor "person" when the latter was eliminated. But instead, Congress retained the word corporation and *added* with respect to the word "citizen," which it then inserted in lieu of "person;" "proof of citizenship may consist * * * in the case of a *corporation*, etc.

IV.

On the question of contemporaneous construction counsel contend that what construction there has been is in their favor; that there is no construction in our favor and the matter on which we base this part of our argument is *not* construction and has no place in this discussion. They say:

> "This plea is based, not upon the record, but upon the affidavits and letters accompanying a motion to advance the cause. This ingenious method of supplementing the supposed deficiencies of the record, etc. * * * We hardly suppose the Court will heed these *ex parte* statements filed in the cause, not for the purpose of aiding it in reaching a correct conclusion, but to secure its early hearing."

Counsel do not assert the matter on which construction favorable to them is based is matter of record in this case, but say:

"It is proper, however, for the Court to take judicial notice of the policy of the Interior Department as outlined in its official circular to subordinates, *and its decisions rendered from time to time as becomes necessary in the transaction of its business.*" Page 19.

The italics are ours. Does it not then become simply a question of this kind: (1) What, if anything, was the construction put on the act by the Interior Department; (2) what is the authenticity or public nature of the evidence of such construction before this Court?

Considering these in their inverse order: The circular referred to by defendants is doubtless a part of the public records, obtainable by any one. Now eliminating for the present from plaintiffs' showing the affidavits of Registers and others, taken by plaintiff on this motion, let us consider only the evidence from the Interior Department. A part of this consists in the official correspondence between the Commissioner of the General Land Office and the Secretary of the Interior and between the Secretary of the Interior and the Attorney General. The exhibits offered by plaintiff are certified copies of these furnished by other officials as copies of public documents. These, at least, then are not *ex parte* statements in the sense that they were procured by and on behalf of plaintiff. They are the public and official statements of the Interior Department declaring what its construction of this statute is and has been. If the case were disposed of now without the decision of this Court,

and the Interior Department continued to patent such locations, could not any corporation ten years hence, when challenged as to its right of location, offer to this Court the corresponcence referred to, taken from these departments, as to what the construction was in 1886?

Necessarily these statements are somewhat of a negative character; but it is apparent that whenever an application for patent was received at the Interior Department based on a location made by a corporation it was necessary to put a construction upon this statute, for the department had to decide whether the location by the corporation was valid or invalid; if it "did not question it," it necessarily put on the statute the construction we contend for, because it approved the application and therein held the application by the corporation valid.

But, after all, the substantial question is, in order to invoke the doctrine of contemporaneous construction, has an Executive Department in its routine work construed this statute and has this construction been of some years standing? Not, "have we the *best evidence* of any such construction?"

And on this, we respectfully submit, it must be apparent to the Court that the Interior Department *has* patented such claims; that in so doing it necessarily passed on the question of the right of the corporation to locate, in the act of granting the patent; that this construction has been uniform and uninterrupted. And we further submit, with refer-

ence to what is shown by purely *ex parte* statements, that no one can doubt, if the statements be true, that there have been a large number of such locations. And that they are true and correct is highly probable, considering the official source from which they emanate, largely, and the instances being matter of record. The records are open to defendant in error, and the data in the motion such as easily verified or disproven.

Plaintiff is without other procedure in which to lay these facts before the Court. If the facts exist, cannot they be shown in some way? Suppose that it were true that ninety-nine out of every one hundred locations were made by corporations and the Interior Department was and had been for years patenting them "without question." Yet the question in the case at bar is presented by demurrer to complaint without opportunity for evidence on this or other point. Could such notorious contemporaneous construction exist and plaintiff be deprived of the right to show the fact to this Court? And if not, how else, under the circumstances, could the matter be shown; or how brought here on the record from the Circuit Court?

Before leaving the subject of contemporaneous construction it may be said with reference to the circulars of the Interior Department, on which defendants predicate their claim to the benefit of the same doctrine, that at most these supply an *inference* in favor of defendants that only natural persons

and not artificial may locate, etc. But even this may be disputed, and whatever force as a negative statement by the department the circular may have, it is utterly destroyed when it appears the department, on a direct presentation of the question, acted otherwise.

In the case of the Sierra Nevada Silver Mining Co., vs. the Union Con. S. M. Co. p. 202 Sickels Mining Laws and Decisions—a decision by Commissioner Williamson of the General Land Office,—it would appear that locations were made by both those corporations. It is said:

"The facts, as appear from the records and files of this "office, are as follows, viz: That the premises described in "said patent were located by the Union Gold and Silver "Mining Company (of which the Union Consolidated Silver Mining Company is the legal successor) June 10, 1859, and record of said location was made July 4, 1859, according to the mining laws then in force. Application for patent by said company was filed in your office August 10, 1868. * * * On the twenty-seventh of May, 1874, the said Union Gold and Silver Mining Company conveyed by deed to the Union Consolidated Silver Mining Company the premises described in said application, which last named company completed the proofs required, and on the seventeenth of August, 1875, made entry of said claim. On the same day the register transmitted the papers to this office and a patent was issued September 28, 1875 (as hereinbefore stated) to the said Union Consolidated Silver Mining Company for the premises, and said patent was duly transmitted to the local office and delivered to the representative of said company. * * * * *

"By the application of the Sierra Nevada Silver Mining "Company, now under consideration (made to this office as

"stated December 16, 1875,) the following facts have been disclosed, viz.:

"That the Sierra Nevada Silver Mining Company "located and recorded under the mining laws of June 22, "1859, giving a description which embraced the ground in "dispute between the two companies, being the northerly "298 feet of ground embraced in the patent which has been "issued to the Union Consolidated Silver Mining Company."

The question of the right of a corporation to locate was not in dispute in this case and the fact of these locations in this instance appear incidentally. The right of a corporation to locate not having been directly in issue in any case, but having been acquiesced in and passed in silence wherever it arose, it is difficult to find instances in the books where the facts as to location are mentioned, and this instance has but accidentally come under our notice. As shown in the former brief and the exhibits in motion to advance, exact information from departmental sources, is beyond our power to produce.

This instance above is significant in view of counsel's contentions, in this: that here are locations by corporations prior to 1872, something which counsel insist was unknown; and again application was made for patent by these corporations in 1868, under the act of 1866, and before the passage of the act of 1872. Counsel say that unquestionably the first authority for even patents to corporations was in 1872. Yet there seems to have been a contrary impression or custom in this instance, in 1868; and it will be noticed this case arose in Nevada, where

mining was the chief industry, and it may be assumed these customs were as well-settled and grounded as anywhere. And both these applications were evidently entertained without question of the right of the corporation to make them, and entry thereon made by the local land office August 17, 1875, and patent issued by the general land office September 27, 1875. As the right to locate was certainly no greater before 1872 than afterwards, and the act of 1872, in regard to citizenship, referring to corporations in the same connection under the acts of 1866 and 1872, it may be regarded that the department in this instance, in 1875, put a construction on the mining laws as they *then* existed, as to the validity of a location by a corporation; that construction being by acquiescence and approval without question.

V.

In our former brief (p. 32 34) with reference to the amendment in the complaint to the effect that the members of this corporation were citizens, we contended that a true construction of this statute allowed this corporation to locate independently of the citizenship of its several members; nevertheless, if we were compelled to and did show that the members were severally qualified, there ought to be no question on the plaintiff's right in this suit. We find no direct reference or answer to this in defendant's brief, other than this language:

"For some reason, best known to the plaintiff in error, the complaint to which defendants' demurrer was originally sustained was amended so that it appears the Josephine Company was a Colorado corporation, and the members comprising it were citizens of the United States. The addition of this averment, if our view of the law is correct, to say nothing of the argument of the plaintiff in error upon proposition, is of no importance, since if corporations are not included within the recitals of the Federal Statutes relating to the mineral domain, it is immaterial whether the corporation whose act is here challenged, was organized under our own or the laws of some sister State, and since the presumption which counsel insists must apply to the citizenship of all the stockholders of a corporation is claimed to be conclusive. No additional argument was submitted by either side upon the demurrer to the amended complaint and it was sustained for reasons presented at the outset." (Def'ts brief, p. 2.)

It is true no additional argument was submitted on the amended complaint, but the reason was the learned Court stated in answer to counsel's suggestion of the amendment, that the additional matter would not change his views on the question, viz., the validity of this location; the amendment was permitted, however, that the record might present to this Court the full question.

What is stated in defendants' brief, as above, is no answer to this phase of the question. Defendants attempt to shield themselves behind the "incorporation" question, and simply say that a corporation cannot locate, and there can be no conclusive presumption of citizenship as we contend. But they are silent when we offer to remove the mask of this

corporation, and waiving the benefit of any presumptions disclose the actual citizenship of the persons who sought to acquire this property by this location. There were natural persons back of this corporation, as in all such cases.

"While a corporation may, from one point of view, be considered as an entity without regard to the corporators who compose it, the fact remains self-evident that a corporation is not *in reality* a person or a thing distinct from its constituent parts. The word "corporation" is but a collective name for the corporate members who compose an incorporated association; and where it is said that a corporation is itself a person, or being, or creature, this must be understood in a figuratively sense only."

1 Morawetz on Private Corporations, § 1.

"The statement that a corporation is an artificial person, or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body; a corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact."

Id., §227.

Viewing this Josephine Company in its real light of "an association of persons," then if they are citizens the location was valid. It matters not by what name they assumed to act in the matter of location or transfer of the right thus acquired. The right to locate existed and the rest is a mere question of identity.

In the Warren Hussey case (p. 91 Sickels Mining Laws) referred to by defendants something is said by Secretary Delano on this question of identity. "The original application in the Kempton patent, which is sworn to by

five different persons, allege that 'Samuel Buck, under the name of B. F. Buck,' was one of the original locators, and that the said Samuel had transferred his interest in the mine to John Segus, who was one of the applicants for patent. There is in the abstract of title furnished, a certificate of the Recorder, of the conveyance from Samuel Buck to the said Segus. I think this is sufficient. Names are arbitrary. Identity is the important matter, and the identity of Samuel Buck with the B. F. Buck, of the location, is satisfactorily shown."

VI.

The difficulties presented by counsel as following a practical application of the construction contended for by us, are largely imaginary and not practical ones. We fail to see the force of the argument that, because corporations might locate, a State can pass no law to regulate their business within that State, thereby making them different from other corporations and causing danger and confusion, etc. We think the State can require of mining corporations such compliance with its corporation laws and that a contrary view only arises from considering corporators as 'citizens' in the broad sense of the word, which is not necessary. They need not be such 'citizens' but artificial beings and yet be within this statute as appears in the opinion of the Circuit Court herein. (Appendix deft's brief.)

And in like manner counsel's argument in this regard concerning the Union Pacific Railway Company and National Banks is based on results which will never occur. Because 'a corporation' may

locate a mining claim it does not by any means follow that Congress or the States cannot create corporations with powers limited to some other work and business, beyond which their acts would be *ultra vires*. It would seem as reasonable to argue that because 'citizens' were unquestionably invested with this power to locate anywhere and any time on the public mineral lands, the State could not temporarily or for life, on account of a criminal offense, deprive the citizen of his liberty and as a consequence of the benefit of this statute.

Neither is the citizen injured in his rights by the presence of corporations in the same field, as asserted in defendants' brief. The product is standard and there is no injury from competition. The corporation must not only have capital, it must *discover* a lode and therein has no advantage over the individual. And the field is practically unlimited.

VII.

But defendants in urging such objections, we think again run counter of their own main argument, namely, that corporations may patent. If the possessory title is property, and the custom is so prevalent of corporations acquiring such titles from locators, and Congress recognizing this has empowered its own corporations and those formed under the laws of the States or Territories to take and hold the possessory title to its mineral lands and obtain its patent; why are not the National

Banks and the Union Pacific Railway organizing their mining departments and controlling these rights? And why are we not encountering the conflicts of laws and suffering the other ills as to these mineral lands, which counsel foresee would result from scarcely any greater provocation than now exists according to their own view of the law.

It is a matter of common knowledge that very many mining properties, both patented and unpatented, are owned and being developed and worked by corporations formed for such express purposes, and it is susceptible of proof that very many of these properties are not only now owned but were located by corporations, and none of the practical objections urged by defendants have arisen. Even the objection urged by counsel and assumed by the learned Court below to be an objection, is in reality of no force, namely, the impossibility or impracticability of corporations participating in miners' meetings. This is now an objection of form rather than substance. Years ago, at the period described in Senator Sawyer's letter, when the miners were without the guide of statute law and were acquiring valuable rights under new conditions arising from time to time; when their agreements and decisions between and among themselves were forming into this common law of which Senator Sawyer, as well as the Courts, speak, and which afterwards largely furnished the foundation for the enactments of Congress and the positive law on the subject; it may

have been important to inquire how far and in what way a corporation could act with the individual. Even then we think the corporation, the same as an association, could designate one individual as its agent to participate in miners' meetings and discharge the obligations of one claim owner or locator in its behalf. But however that may have been, or how it may have affected any customs or practices among miners at the time, something which we submit is in no way shown to the Court by defendants, the matter no longer presents a material question. Aspen, where the Vallejo claim involved in this case is situate, and Leadville, two of the most celebrated of the Colorado mining districts, and which have contributed and are contributing such a large portion of the total output of the State in valuable minerals, have sprung into existence in the last ten or a dozen years. The claims in these districts run into the hundreds if not thousands in number and the owners are as diverse and numerous almost as the claims. Yet we doubt whether a 'miners' meeting' as understood in the books, was ever held in either District. Miners may have met the same as persons interested in a certain industry, such as cattle growers, farmers, millers, railway shippers, etc., frequently meet; but we think counsel will scarcely contend these miners have ever met to formulate or announce anything whatever regarding their tenures, property rights, or even the manner of working, etc., their claims. Under the act of 1872 and the regulations of the

Interior Department thereunder and the State laws concerning recording, etc., all these matters are well settled, and each claim or mine owner marks his claim, does his work and fixes his rights as these laws and regulations have provided and not as any miners' meeting decrees; and when his or its right is assailed or invaded, the Courts of the State or the United States, and not miners' courts or miners' meetings are appealed to. There are no longer, and have not been to any appreciable extent, at least since the law of 1872 was enacted, and probably since an earlier period in most of the States and Territories, any regulations or government among miners with respect to their mining interests, but these interests have been acquired, held and asserted under fixed and statutory laws.

The miners' laws and customs in earlier times occupied the same field and performed the same offices with respect to mining property now occupied and performed by the United States laws and department regulations thereunder, and State and Territorial laws; they related to property rights, how acquired, held or lost, marking of claims, recording, etc.

"From the discovery of rich gold fields in California, January 19, 1848, to July 26, 1866, there was no mining law of the United States relating to the precious metals on the public domain other than those above set out; and the mineral lands of the United States, copper, lead, etc., had all been disposed of under the above laws in blocks

conforming to legal subdivisions of the surveys, the soil carrying with it the minerals.

"In California, the Spanish and Mexican law and miners' usage were the law. * * * Local usage and regulations governed mining camps and towns and regulated the size and conditions of working mining claims. These regulations first applied to placer mining and afterwards extended over and included quartz claims. The rush of emigrants to California after Marshall's discovery was first from Oregon, Mexico and the Sandwich Islands. Then followed the emigrants from the older States of the Union. The Mexican miner and the Georgia goldwasher joined hands, and local usage, consent and mutual agreement made law."

"Public domain, 1883, p. 11."

These regulations afterwards formed the basis for the statutory law. Some provisions were incorporated into the law and others were recognized in a general way where not inconsistent with the laws of the United States. This recognition applied to regulations then in force, and not to regulations to be made thereafter, the necessity for such regulations (which were made in the absence of laws) being done away with by the passage of laws. All the substantial matters which the miners provided for are now embodied in statutes, recording, etc., in State statutes, dimension, marking, discovery of vein, annual work, etc., by the United States law. In the days of miners' meetings they had their "recorder," for a mining district; now location certificates are filed with the County Clerk under general registry laws. Then they provided how large a claim should be, how marked, etc., and even (in

California at one time) that foreigners might mine on procuring a license. These regulations varied in different districts. Now they are supplanted by the United States law and regulations thereunder in nearly all respects, and these provisions are uniform throughout the land. There is little or nothing left to be provided by miners. The United States laws and provisions thereunder are intended to *supplant* former regulations. In the Maid of Erin case, decided by Secretary Teller, February 15, 1884, it is doubted whether even a State law may in anywise add to the United States law. He says:

"If the Legislature of Colorado had authority to require such discovery in the discovery shaft, it is by the provisions of Section 2319 of the Revised Statutes, (enacted May 10, 1872.) It may be well doubted whether the Legislature of Colorado can attach such a condition to the appropriation of mineral lands, when the national statutes only provides for the discovery of mineral within the claim."

Wight vs. Tabor, p. 738, Vol. II, Decisions Interior Department.

In much notable litigation, such as the conflicts between lode and placer rights at Leadville and the Apex and Side Line cases at Aspen, the statutory law fixed the rights and remedies and miners' rules and miners' meetings had no part whatever, although these were matters affecting many claims. Hence we submit the matters of miners' meetings, etc., have been given an exagerated importance and are not entitled to the weight in the discussion of the

question before us, which counsel contend for and which was in a manner conceded by the learned Court below. A decision of this Court that a corporation may locate will not only be without the results anticipated by counsel but will give security to many titles based on such locations, and will further the purpose of Congress to develop the mining resources of the country.

Respectfully submitted,

HUGH BUTLER,

Attorney for plaintiff in error

FILED
FEB 15 1889
JEROME B. McKINLEY

IN THE

Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1888.

ALEXANDER B. McKINLEY,
Plaintiff in Error.
vs
JEROME B. WHEELER, ET AL.,
Defendants in Error.

No. 233.

BRIEF OF DEFENDANTS IN ERROR.

C. S. THOMAS,
T. M. PATTERSON,
Of Counsel for Defendants in Error.

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Since the decision of this cause in the Court below, the defendants in error have conveyed all interest in the property in dispute to the Aspen Mining and Smelting Company. Our employment is by that corporation, and this is mentioned as explanatory of the fact that more than one brief may be presented in behalf of the defendants in error.

The single question presented by the record concerns the power of a body corporate to discover or locate mining claims upon the public mineral domain. The recognition of such a right is essential to the title of the plaintiff in error; its denial establishes that of his adversary. We have read his exhaustive brief with much care and much interest and it cannot be denied that he presents a strong *prima facie* case, the strength of which however consists not so much in the reasons given as in the vigor and confidence with which they are asserted.

For some reason best known to the plaintiff in error the complaint to which defendants' demurrer was originally sustained was amended so that it appears that the Josephine Company was a Colorado corporation and the members comprising it were citizens of the United States. The addition of this averment, if our view of the law is correct, to say nothing of the argument of the plaintiff in error upon the proposition, is of no importance since if corporations are not included within the recitals of the Federal Statutes relating to the mineral domain, it is immaterial whether the corporation whose act is here challenged, was organized under our own or the laws of some sister State, and since the presumption which counsel insists must apply to the citizenship of all the stockholders of a corporation is claimed to be conclusive. No additional argument

was submitted by either side upon the demurrer to the amended complaint and it was sustained for reasons presented at the outset.

I.

It is conceded by our opponents, that the right of a corporation to go upon the public mineral domain and discover and locate a mining claim must be found, if it exists, in the enactments of Congress, which doubtless has the power to confer it. It must also be conceded that if Congress has seen fit to endow its own and the artificial organizations of the several States with this privilege it has with reference to the public mineral lands made a radical departure from the policy which has always governed it in the dispoal of the remainder of the National domain. Recognizing this fact at least as applicable to agricultural lands, Mr. Butler seeks to evade it by the specious argument that "widely different interests and purposes as respects the two classes of lands are to be served. In the one case the lands are supposed to be valuable for themselves as they are found," and as to them, "the Government is to serve the double purpose of providing homes for its citizens and of settling and improving waste lands. In this a corporation has no place." But when its mineral lands are to be disposed of we have only "barren mountain sides, rocky and worthless as a rule," to bestow, and therefore the citizen must take his chances with the corporation, for "it has been

the settled policy of the Government to promote the development of the mining resources of the country." We fail to see wherein these circumstances affect the question.

It has assuredly been the policy of the Government to promote the development of the agricultural and pastoral as well as the mining resources of the nation. In countries like Colorado, New Mexico and Wyoming, "associations or aggregations of persons and their combined contributions of capital" are as necessary for the development of their agricultural and pastoral lands as for any other. The construction of irrigating canals many miles in length, through mountains, over valleys and across gorges, the fencing of thousands of acres of land and the care of thousands of aggregated cattle, requiring vast sums of money for their accomplishment, have frequently been urged in extenuation of the attempt to secure by questionable means large areas of public land, or valuable water rights; the same reasons have been vainly pressed upon the attention of Congress in the effort to secure some modification of the National policy by which the restrictions of the right to secure title to agricultural lands to citizens might be enlarged if not removed entirely.

It seems strange too that our Government would knowingly adopt a policy by which its most valuable donations of real property should be conferred upon corporations and citizens alike, while

those of ordinary and regulated value should be reserved for the exclusive use of its citizens. "We cannot overlook that public history," says this Court, "which informs us that—not only without interference by the National Government but under its implied sanction, vast mining interests have grown up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country."

Sparrow vs. Strong, 3 Wall, 104.

Neither should this Court overlook the fact that on the mineral domain of the United States are hundreds of thousands of its citizens, many of whom have by the intelligent or fortuitous prosecution of work secured a competency, by the side of which the gradual growth of the farmers' wealth seems infinitesimal. Was it the policy of our Government that corporations could be organized to spread their locations all over this domain, and thus secure the benefit of its largest, if not to the exclusion at least to the injury of the citizen, when that policy has ever been denied to all that part of our vast territory which does not contain "gold, silver, cinnabar, lead, tin, copper or other valuable deposits?"

For it will not do to assert that the Government has adopted one system for disposing of its agricultural and another for its mineral lands, unless the latter system is as general as the first, which is not the case. Coal lands, for example, are mineral and

are excluded from agricultural entry. By the act of March 3, 1873, (17 Stat. at Large 607 sec. 2347 R. S.) "Any person above the age of twenty-one years who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above," shall have the right to enter such lands.

The other sections of the act emphasize the limitation quoted and the circular of the General Land Office, (July 31, 1882,) instructing local officials how to act under it, construes it literally. The word "person" as here used in connection with the word "citizen" precludes the idea of a corporation, while the word "association" is not used "in reference to a corporation." See sec. 5 R. S., U. S.

Sections 2380-94 of the Revised Statutes of the United States make provision for the reservation and patenting of town sites. When patents are obtained by local corporate authorities under these sections, the patent so issued is in trust for the occupants. A corporation cannot locate a town site and secure a patent through the local authorities for its use and thus speculate upon the bounty of the Government.

Mayor, etc., vs. Aspen T. & L. Co.,
10 Col. 191.

It is to be remarked also that notwithstanding the the Government has within the past fifty years granted millions of acres of its lands to States and corpo-

rations, yet such grants have always been expressly restricted to agricultural sections; and by sec. 2346 it is declared that "no act passed at the first session of the Thirty-Eighth Congress granting lands to States or corporations and shall be construed to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided," etc.

If then it be true that by the act of May 10, 1872, Congress threw the mineral domain open to exploration and purchase by corporations, it departed from its established and undeviating policy as to all other parts of that domain, and made an innovation which we think was not contemplated by those who desired to give miners an opportunity to secure titles to property of which they were or might become entitled to the possession of.

II.

The only act by which it can with fairness be claimed, is given to corporations the right to locate or discover a mining claim, is that of May 10, 1872; for the phraseology of all antecedent laws upon the subject excludes it. The first enactment of a Federal character which refers to mining claims is that of February 27, 1865. (13 Statutes at Large, 441.) By section 9 of that act it is declared "that no possessory action *between individuals* in any of the Courts of the United States for the recovery of any mining title," etc., "shall be affected by the fact that

the paramount title to the land on which such mines are is in the United States," etc. This act was designed to establish Federal Courts in Nevada, then but recently admitted, yet the last section is significant in view of the fact that it was prepared to suit an existing condition of things, and by the regulations of miners they *as individuals* were recognized as having the right to locate mining claims.

The act of July 26, 1866, (14 Stat. at Large, 251), is the first law passed by Congress and bearing directly upon the subject. It was introduced by Senator Stewart of Nevada, on the nineteenth day of June, and was carefully prepared by him. No man then in public life was more familiar with the status and history of mining in the Far West. What that status and history were, is graphically set forth in a letter addressed by Senator Stewart to Senator Ramsey prior to the introduction of the act of 1866, and appended to this argument; and it is safe to assert that the objects sought to be attained by the passage of the act are all included in the letter. The first section of that act is almost identical with the first section of the act of 1872 (R. S., Sec. 2319) and which was substituted by Senator Stewart for the sections of the House bill referring to the same subject (Cong. Record 2d session 42 Congress, p. 2897). For the convenience of the Court we present the two sections in parallel columns:

ACT OF 1866.

"SEC. 1. *The* mineral lands *of the public domain*, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and *occupation* by *all* citizens of the United States and those who have declared their intention to become *citizens subject to such* regulations *as may be* prescribed by law, and *subject also* to the local customs or rules of miners in the several mining districts, so far as the same *may* not *be in conflict* with the laws of the United States."

ACT OF 1872.

SEC. 1. "*All valuable* mineral *deposits in* lands *belonging to the United States* both surveyed and unsurveyed are hereby declared to be free and open to exploration and *purchase* by citizens of the United States and those who have declared their intention to become *such, under* regulations prescribed by law, and *according* to the local customs or rules of miners in the several mining districts so far as the same *are applicable and* not *inconsistent with* the laws of the United States."

By the second section of the act of 1866, reference is made to an "association of persons" as synonymous with "association of claimants," but beyond this there is nothing at all to indicate that the act was not intended for the benefit of individual citizens. This act, which was said to be declaratory of the rules and regulations of miners previously adopted, and which followed the letter of Senator Stewart, clearly shows that up to this time at least Congress had no thought of placing corporations on a par with citizens in the disposition of its mineral lands.

The act of July 9, 1870, (16 Stat. at Large, p. 217,) was doubtless designed to extend the provisions of the act of 1866 to placer claims. It limited all claims to a maximum of 160 acres for any one person, or association of persons, and permitted "two or more persons or association of persons,"

under certain conditions, to make joint entry of their claims. Now, while it is true that by Sec. 1, R. S. U. S., the word "person" may be extended and applied to partnerships and corporations, yet the term, as used here, must be construed by the act of 1866, of which it is amendatory. In the next place it certainly could not have been the intention of the law makers to here use the word in that sense, because in that case "two or more corporations, or associations of corporations," might be endowed with power to enter an entire district for patent in one application. We venture the assertion that no attempt was ever made prior to or under the acts of 1866 or 1870 to discover or locate a mining claim in the name of a corporation, or that if such attempt was made, the records of the General Land Office give no account of it.

III.

We are now face to face with the act of May 10, 1872, and its consideration will be as brief as the importance of the subject permits. This law is the outgrowth of a bill introduced in the House by Mr. Sargent, of California, on the fifteenth day of January of that year. It was debated in the House and passed without material amendment. It was sent to the Senate, which passed a substitute, changing the original bill in some particulars, which substitute was accepted by the House, and thus became the law of the land.

If, now, it be the fact that one of the objects sought to be subserved by the passage of the act of 1872 was to extend the privileges granted by former acts to corporations, it is remarkable that something was not said in debate to that effect. Yet the records of the *Globe* may be searched in vain to find a word about it. Mr. Sargent, in explanation of his bill, said its principal object was "to oil the machinery a little." He also declared that "*it does not change in the slightest degree the policy of the Government in the disposition of its mining lands.*" It was designed "to facilitate *the miners* obtaining their title," etc. It would "induce *miners* to purchase their claims," and "settle themselves permanently."

The first section of Mr. Sargent's bill was identical with the Senate substitute, save in one important particular. It gave the right to explore and purchase the public mineral domain to "*all persons*" which might include everything, aliens as well as corporations. The Senate, doubtless at the suggestion of Mr. Stewart, struck out the word "persons" and inserted in lieu thereof the words, "citizens of the United States and those who have declared their intention to become such," thus preserving the requirement of the act of 1866. When the substitute was reported the debate which followed concerned, chiefly, the clause requiring the annual performance of $100 worth of labor, and the expediency of de-

voting the fund to be realized from the sale of mining lands to the development of the mining resources of the nation. Mr. Stewart intimated that the chief object to be subserved in a change of the law was to enable miners to take up 1,500 feet of a vein without resorting to subterfuge. In reply to Senator Cole he said that the right to locate placer claims remained as it was fixed by the act of 1870, and the bill then under discussion only affected the method of patenting them, (p. 2456–7, *Cong. Globe*, vol. 3, 2d Sess. 42d Cong.)

When the Senate substitute reached the House, Mr. Sargent, (p. 2897), in explaining its provisions, said: "The House bill provided that 'any person' might take up a mining claim. The Senate has struck out the words 'any person' and substituted 'any citizen of the United States, or person who has declared his intention to become such.' We are satisfied with that *modification*." It was extensive and material, and as a "modification" it necessarily restricted and reduced the limits of the right as originally provided for. If, notwithstanding such modification, corporations organized in any part of the Union can, nevertheless, explore and locate mining claims, it is difficult to understand how the change can affect the law.

We do not forget that the Legislative intent, as gleaned from contemporaneous debate, is not the best test of the meaning of a statute. Yet it is

always important as throwing light on questions of construction, and it cannot be that the change affected in section 1 of the act by the Senate Committee was not the result of deliberation and of a desire to restrict the right to locate a mining claim to those who enjoyed it under the rules and regulations of miners.

There are but three sections of the act of 1872 which in terms refer to corporations. Without the references there found the question could scarcely admit of argument. With the exception of the clause at the end of section 7, regulating the method of proof of citizenship, that section, together with sections 6 and 11 as originally introduced, were incorporated in the Senate substitute, and it is quite probable that the radical modification of section 1 was deemed sufficient to confine the right to locate claims to citizens alone. It is not surprising that these clauses should have been inserted in the House bill; they still appear because the framework of that bill was used in the construction of the Senate substitute.

As originally passed section 6 provides that "any person, association or corporation authorized to locate a claim under this act may," etc. Section 7 as originally passed provided for proof of citizenship of individuals, associations or corporations under this act or the acts of July 26, 1866, and July 9, 1870. This proviso was omitted in the revision

and made the subject of a separate section (2321 R. S.) without any reference whatever to the previous enactments of Congress. During the discussion of the bill in the Senate Mr. Cole, of California, objected that it extended the right of location of placer claims very materially, but Mr. Stewart denied this, saying that the right to locate such claims remained as it was before, and section 11 was intended to secure the right to owners, etc., of placer claims to patent veins or lodes within their boundaries.

This statement of Senator Stewart, coupled with the reference which section 7 makes to the acts of 1866 and 1870, clearly indicates that it was intended to give to corporations which had acquired mining claims from the locators thereof prior to patent, to go forward and secure such patent if desired. Upon no other hypothesis can they be explained, since under those acts, as we have seen, corporations were powerless to locate claims. It is noticeable too that in section 1 of the act of 1872 (Sec. 2319 R. S.) which throws open the public domain to exploration and purchase, and in the second section of the act of 1870 (Secs. 2329–2330 R. S.) which gives the right to enter and patent placer claims *there is no reference whatever to corporations.* The provisions of the law concerning them relating almost entirely to the procedure by which final title is obtained. We recognize the wisdom of the rule invoked by plaintiff that a statute should if possible be so construed

as to give effect to all its parts, and we respectfully submit that in this instance the only method of its accomplishment is to concede to corporations the right to purchase mining locations after they become such, and then proceed, if desired, with the ultimate acquisition of title. Any other construction does violence to the first section of the act of 1872, and measurably enlarges the provisions of the act of 1870. It will not be lightly determined that the settled policy of the Government has been abandoned when such determination must be reached, if at all, by inferences drawn from the language of an act of Congress, rather than by the language itself.

For it has been held that when a mining claim is perfected under the law it is property in the highest sense of the term, and may be bought, sold and conveyed, and will pass by descent. Forbes vs. Gracey, 94 U. S., 762; Belk vs. Meagher, 104 U. S., 283; Noyes vs. Manthe, 127 U. S., 353. Its owner need never patent it unless he desires to do so. His grantee, if not disqualified by positive law, takes his claim so perfected coupled with the privilege which he also had of applying for patent if desired. Hence, since a corporation might buy before patent, it is given the right to complete title to the thing bought. This right is all it has under the statute; and, as we have already seen, the phrase "any person, association or corporation authorized to locate a claim," etc., was originally in-

corporated in the House Bill and must be construed in connection with the express changes which were made therein by the Senate.

When we turn to other parts of the act of 1872, abundant testimony is offered in support of the view that corporations were not to be included within the purview of its first section. Section 3 defines the extent of the right given to locators, "their heirs and assigns." Section 5 gives the power to co-owners to compel contribution for sums expended in performing the annual labor, and if the delinquent fails to pay the same *his* interest shall become the property of *his* co-owners. Section 10 continues the act of 1870 in force, save as to method of obtaining patent, and limiting placer claims to twenty acres for each *individual claimant.*

By section 1, citizens, etc., may explore and purchase valuable mineral deposits "according to the local customs and rules of miners in the several mining districts, so far as applicable and not inconsistent with Federal laws." By section 5, these miners may make rules subject to the qualifications of the section. This is a recognition of the rules already made and of those to be made. The foundation of the law is conceded to have been those rules and customs which miners had formed for themselves before the Government recognized any right in any person to go on the public domain and delve for minerals. These rules and customs were

a sort of common law of which the Statute was declaratory. Prior to the twenty-sixth day of July, 1866, two hundred and four, between July 26, 1866, and May 10, 1872, fifty-three mining districts have been reported as having their code of rules. It is safe to say that none of them, although scattered over all the western States and Territories, contain a line which recognizes the right of a corporation to locate a mining claim. The meetings at which these codes were framed were not attended by authorized or other corporation agents, nor could the corporation vote on their adoption or rejection. There is not an instance, we venture to say, under these rules and in these districts, where a location was ever made otherwise than by the miners or such of them as were citizens, native or naturalized.

Since May 10, 1872, and up to the year 1885, eighty-one additional districts were formed, which adopted rules and regulations for their government. In none of these, so far as our examination has extended, are there any expressions indicating a recognition of the right contended for by the plaintiff in error. These facts demonstrate that the practice and sentiment of those for whose benefit the law was passed do not include the extension of their privileges to artificial beings.

It is noticeable, too, that Congress has conferred power to make these regulations, not upon "individuals, associations and corporations," but upon

"the miners of each mining district." It is as easy to bring a corporation within the definition of a miner as within that of "a citizen of the United States or one who has declared his intention to become such."

Some stress is laid by counsel upon the fact that it appears in the motion to advance the cause that claims have frequently been located and patented in the names of corporations. We shall speak of this argument hereafter, but at present it is not necessary to do more than say that if such locations have been allowed it is in spite of and not in accordance with the law, and that they have been successful simply because unchallenged. We assert, moreover, that ninety-nine out of a hundred of the instances mentioned will, if examined, show that the original locations were made by citizens who, prior to patent, transferred their claims to corporations, which caused the fact to be noted in the aplication for patent, either by continuations of the abstract or by securing official surveys and re-locations after conveyance made.

So far, then, as the phraseology of the Statute is concerned, the construction claimed for it by the plaintiff in error is not justified. Just here we must take issue with counsel's plea of contemporaneous construction. This plea is based, not upon the record, but upon affidavits and letters accompanying a motion to advance the cause. This ingenious

method of supplementing the supposed deficiencies of the record is original, if nothing more, and offers a complete remedy for those embarrassments which sometimes befall a practitioner who discovers that his argument in a court of review is unavailing because he has failed to supply the record with facts necessary for its basis. We hardly suppose the Court will heed these *ex parte* statements filed in the cause, not for the purpose of aiding it in reaching a correct conclusion, but to secure its early hearing. Did such a method of supplying a cause with facts offer itself, we could burden the clerk's office with verified statements in opposition from every mining district in the West.

It is proper, however, for the Court to take judicial notice of the policy of the Interior Department as outlined in its official circulars to subordinates and its decisions rendered from time to time as becomes necessary in the transaction of its business. The official Circular No. 1, of April 1, 1879; (Sickles' Mining Laws and Dec, 524, *et seq.*; U. S. Mining Laws, 22, *et seq.*,) to Registers and Receivers is very elaborate and has been since its promulgation the guide to all subordinate officers and to citizens in the location and patenting of mining claims. Section 1 of the Circular recites that "It will be perceived that by the provisions of the law the mineral lands," etc., "are open to exploration," etc., "by all citizens of the United States and those

who have declared their intentions to become such.'' Sec. 9 informs the public that: "From and after the tenth of May, 1872, *any person who is a citizen* of the United States, or who has declared his intention to become a citizen, *may locate*, record," etc., "a mining claim," etc. The use of the pronouns "who" and "his" is deliberate and cannot well be construed to refer to neutral beings.

But section 9 proceeds to state that "*an association of persons severally qualified as above may* make joint location of such claims" etc. When this is compared with section 27 of the Circular, the carefully drawn distinction between the citizens and the corporation is the more apparent. The section last referred to is as follows: "By Sec. 2325 authority is given for granting titles for mines by patent from the Government to any person, association or corporation having the necessary qualifications as to citizenship and *holding possession* to a claim in compliance with law." This is the first mention in the circular of a corporation. It is significant that it is mentioned in connection with "*the right to patent a claim of which it holds possession*," and not at all in connection with the right of discovery and location. This circular so far as it relates to the procedure for locating and patenting a mining claim is but a repitition of earlier ones upon the same subject.

The Land Department has made but few direct rulings upon the subject. The one most directly involving it is that of Secretary Delano on January 2d, 1875, in the case of Warrin Hussey, et al. It is there determined that the *claimant* applying for a patent needs not be one of the locators. Among other things the Secretary quotes the first section of the act of 1872, italicizing the clause referring to citizens, followed by the sixth section, italicizing the words "authorized to locate a claim under this act." He then declares that "*These provisions and those of the Mining Act of July 26, 1866, and of the Preemption and Homestead Acts, indicate clearly to my mind the intention of Congress that no one but a citizen, or a person who had declared his intention to become such*, should have the privilege of locating a mine or acquire a patent therefore."

Sickles p. 95.

Turning again to the Circular of Instructions it will be seen that the location of placer claims is confined to individuals, just as was the rule prior to the passage of the act of 1872. Paragraphs 53-70 are devoted to the subject. By paragraph 63 the law is expressly construed, and all officials are instructed that "no location made by an individual can exceed twenty acres, and no location made by an association of individuals can exceed one hundred and sixty acres, which—cannot be made by a less number than eight *bona fide* locators," etc. Here

again the instructions are silent as to corporations. Can it be that the plaintiff in error will contend that this means that a placer location of one hundred and sixty acres "cannot be made by a less number than eight *bona fide* corporations?" or that Congress has denied the right to corporations to locate placer, but granted them the privilege of locating lode claims?

But counsel for plaintiff has already asked why Congress should have permitted citizens only to locate claims, when they, after so doing, may convey to corporations, who can thus be at once invested with what they might as well have been empowered to take in the first instance. To this we reply that we are not concerned with the wisdom or folly of the rule but only with determining what it is. The same course of argument would demonstrate the absurdity of excluding aliens from the right of location, since after patent conveyances can be made to anyone, it could also be employed to justify the preemption and homesteading of agricultural lands by corporations, for they can acquire title to that class of realty after the individual has taken the preliminary steps. It could also be applied to a construction of the statute concerning the acquisition of coal lands, for it is notorious that individuals who locate them frequently do so for corporations, to which conveyances are made before the ink upon the individual filings is dry. In some instances, notably appearing in the record of U. S. vs. The

Colorado Coal and Iron Company, recently decided by this Court, the names of mythical citizens are sometimes used by corporations for the purpose of securing this class of lands, it being inexpedient and unlawful for the corporation to make filings in its own name. How easily this awkward, and in some instances criminal process, could be dispensed with if the term "citizen of the United States over the age of twenty-one years" could be construed to include a corporation, the members composing which are such citizens. But it seems to us too plain for argument that Congress, for reasons sufficient to itself, will not permit these artificial creations to exercise so important a prerogative of individval citizenship in the disposal of any part of the public domain. In this instance too, we find in the law evidences of the fact that Congress was concerned in limiting the act of locations to citizens or those who had declared their intentions only, because it is expressly declared by Sec. 7 (Sec 2326 R. S), that nothing therein contained shall be construed to permit the alienation of title conveyed by patent for a mining claim to any person whatever.

So far then as we have any contemporaneous construction by a co-ordinate department of the Government it is in support of the position assumed in this cause by the defendant in error.

IV.

For certain purposes, chiefly jurisdictional, the courts have clothed corporations with a few of the attributes of citizenship, but only to a limited extent. As artificial beings they are capable of holding property, transacting business and of suing and being sued. It is impossible however that they can be included within the term "citizen of the United States or those who have declared their intention to become such." Chief Justice Marshall has said that a corporation is an artificial being invisible, intangible and existing only in contemplation of law. Dartmouth College Case, 4 Wheat, 518. This Court has also called it a fictitious or politicial person. Head vs. Ins. Co., 2 Cranch 127. Mr. Morawetz says that when called a person or a creature, this must be understood in a figurative sense only.

So long ago as 1809 this Court determined "that a mere legal entity, a corporation aggregate, is certainly not a citizen," and therefore could neither sue nor be sued in the Courts of the United States unless its stockholders possessed the requisite citizenship, Bank vs. Deveaux, 5 Cranch, 86. In Bank of Augusta vs. Earle, this doctrine was not only emphasized but it was declared that though the incorporators are all citizens of the State creating the corporation, yet it cannot claim their rights as citizens of the United States to make contracts in other States. 13 Peters, 519. This doctrine has been

modified to the extent that the citizenship of incorporations will for jurisdictional purposes be conclusively presumed to be that of the State creating the corporation, so that its status may be fixed in the Federal Courts, but it has been carried no further. Thus in Miller vs. Dows, 94 U. S., 515, Mr. Justice Strong says: "A corporation itself can be a citizen of no State in the sense in which the word 'citizen' is used in the Constitution of the United States. A suit may be brought in the Federal Courts by or against a corporation, but in such case it is regarded as a suit brought by or against the stockholders of the corporation; and for the purpose of jurisdiction it is conclusively presumed that all the stockholders are citizens of the State which, by its laws, created the corporation." R. R. Co. vs. Whitten, 13 Wall, 283; Ins. Co. vs. Francis, 11 Wall. 210, and Ducat vs. Chicago, 10 Wall, 410 S. C., 48 Ill. 172 are in point here.

On pages 8 and 9 of his argument the plaintiff in error intimates that this presumption of citizenship being conclusive cannot be questioned for any purpose. But that is not a fair deduction, for the conclusive presumption is expressly declared to be for jurisdictional purposes only, and the distinction so carefully noted indicates that for all other purposes there is no presumption. *Expressio unius est exclusio alterius.*

It is a curious fact that the term "citizen of the United States" had no fixed definition prior to the adoption of the 14th Amendment. Slaughter House cases, 16 Wall, 72. The lack of it was one of the principal causes which led to the adoption of that famous article. Mr. Blaine speaks of the absence of such a difinition prior to that time as "a grave omission in the original Constitution." Twenty Years of Congress, Vol. 2, p. 188. By the act of April 9, 1866, Congress, adopting substantially the language of that amendment as it was finally adopted, declares that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

In December, 1868, this Court decided the celebrated case of Paul vs. Virginia, 8 Wall, 168, and declared that corporations were not citizens within the meaning of that clause of the Constitution, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Yet they must be brought within that definition as we shall see if they are given the power to locate mines on the public domain, otherwise the State of Colorado could not deny to a corporation organized in the State of Florida the right to locate a mining claim within its limits. This Court is familiar with the exhaustive opinion of Mr. Justice

Field in this great case, an opinion which will always stand out as one of the great land marks of Constitutional construction, and we shall only add that wherever the question has presented itself since that time it has been considered as forever settled by that unanswerable opinion.

Ducat vs. Chicago, 10 Wall, 410.

Insurance Co. vs. Massachusetts, 10 Wall, 566.

Slaughter House cases, 16 Wall 71.

In the latter case, which directly involved the determination of another but a kindred question, it is clearly made to appear what are the privileges and immunities of citizens of the United States, and it is evident that they appertain to the individual and have but little, if any, place in the autonomy of artificial beings. Indians, though separated from tribal relations and living as any other resident of the country, are not citizens of the United States under the provisions of the 14th Amendment unless naturalized or taxed, or otherwise recognized as citizens by the State or the United States.

Elk vs. Wilkin, 112 U. S., 94.

Mr. Justice Woods in Insurance Co. vs. New Orleans, 1 Woods, 85, decides that an incorporated company is not *a citizen of the United States*, or a *person* within the meaning of the 14th Amendment. "'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States, and of the State wherein they reside.' No words could make it clearer that citizens of the United States, within the meaning of this article, must be natural and not artificial persons; for a corporation cannot be said to be born, nor can it be naturalized. I am clear therefore, that a corporate body is not a citizen of the United States as that term is used in the 14th Amendment;" and it seems equally clear that if it is not a citizen of the United States under the provisions of that amendment, it can find no warrant for the claim anywhere in the Federal Constitution.

The act of 1866 was introduced and passed at a time when the debates which led to the ultimate adoption of the 14th Amendment were in progress, and that of 1872 followed soon after the final ratification of that Amendment. Every participant in these debates voted on the act of 1866, and nearly all of them were in Congress at the time of the adoption of the act of 1872. It would be idle to say that the term "citizen of the United States" was used unadvisedly by the law makers on these occasions; or that its import was not fully realized and understood. Viewed, then, in the light of contemporaneous history and debate, it is small wonder that wherever a definition of the term has been ventured upon since then by the courts of the country, such definition has conformed to the general tenor of Congressional opinion as then outlined and understood.

V.

It has been many times determined, that although corporations created under the laws of one State may do business in another, yet they can only do so under such terms and by the observance of such regulations as the Legislature of the latter State may prescribe for them. As expressed by a recent text writer, "A corporation has no implied authority to do any act in a foreign State which is not permitted by the laws of the latter to individuals generally." Morawetz, Section 505. It is equally clear that a State may, if it desires, wholly exclude from its territory those corporations which are chartered by other States, and no Court has a right to inquire into the motive of such exclusion.

Doyle vs. Insurance Co., 94th U. S., 535.

Insurance Co. vs. French, 18 Howard, 407.

Slaughter vs. Insurance Co., 13 Grattan, 767.

Western Union Tel. Co. vs. Mayer, 18th Ohio, 539.

Utley vs. Clark Gardner Co., 4th Colorado, 369.

Now, if the term "citizens of the United States" is inclusive of corporations organized under the laws of any State or Territory, and these organizations are endowed with authority to locate mines to the same extent as are individuals, then it

follows that since a citizen of the State of Maine, and of the United States, can locate a mining claim in Colorado, therefore a corporation organized in the State of Maine can do the same thing, notwithstanding some law might exist on the statute books of this State excluding foreign corporations from doing that business or holding such property within its limits. It will not do to say that only those corporations which are permitted by law to do business within the State of Colorado are included in the Federal statute, because that would draw a distinction between natural and artificial citizens not warranted by the statute itself. Otherwise it would be necessary for plaintiff in error to read the term "citizens of the United States" as including all individuals and such corporations as the particular sovereignty in which the mine is situated might see fit to recognize.

The State of Colorado can pass no act limiting or restricting the right of a citizen, or one who has declared his intention to become such, no matter where he may reside, to discover or locate a mine within its boundaries. That being so it would have no right to place limitations of any sort upon corporations whose citizenship is co-extensive with that of a natural person, and which could be established by the introduction of a charter deriving its authority from the law of some State or Territory. The best of reasons might exist for the exclusion of such

foreign corporations from our State, and its inability to do so would produce a condition of things well described in the graphic language of Mr. Justice Field in Paul vs. Virginia.

"If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States, without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

"If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States, were even restricted to such business as corporations of those States were authorized to transact, it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose,

however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the nnmber of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal."

Another serious practical result of the recognition of the rule contended for by plaintiff in error would be, that all corporations, created for any purpose, or for divers purposes, would be included in the definition of the term "Citizen"; and they would be empowered, without regard to the object of their creation, to discover and locate mining claims. Railroad companies, banking companies, insurance companies, navigation companies, and other corporations, as citizens of the United States, no restrictions being placed upon their power as such, might open a mining department, send out their agents over the public domain, prospect for, and discover and locate, mines; in consequence of which in some instances, doubtless, the original purpose of their organization would be lost in the extent of the accumulation of

the new business thus suddenly thrown into their hands. The act would be, in effect, a grant of power and privilege to corporations in general, by means of which in addition to the powers already exercised they would be endowed with the right to hold mining lands *ad infinitum*; and indeed the Government of the United States, through its Congress, might perhaps be recognized, under such an act, as having authority to issue charters of incorporation to private concerns for mining purposes by means of which the powers granted by the Constitution to the Federal Government would by necessary implication be measurably enlarged. With the exception of the Union Pacific Railway Company and the National banking institutions of the country, there are comparatively few corporations deriving their power from, or owing their existence to, national legislation. If any corporations are to be considered as citizens of the United States, surely these are they. Will it be contended by our adversaries that these concerns, under the act of 1872, have the right to prospect for mineral upon the public domain and discover and locate claims, and if not will counsel please tell us where the line in the law is drawn between those corporations which may, and those corporations which may not exercise this privilege of citizenship? And if the line is so drawn, will counsel go one step further and inform us where the authority for drawing it or locating it exists?

These are some of the difficulties which beset the path of the plaintiff in error.

There is no question but that aliens are excluded from the privileges conferred by the mining acts. While Congress permits patented mines to be granted (to use its own language) "to any person whatever," it certainly had some good reason for denying to citizens or subjects of other lands the right to take those initial steps upon which all patents to mining property are based. It is never the purpose of a legislative body to permit that to be indirectly done which it directly prohibits. If a corporation is to be deemed a citizen of the State or Territory under whose laws it is organized, what shall prevent three or more aliens who cannot individually discover and locate mining claims from organizing themselves into a corporation, and in the name of such artificial body, discover and locate mining claims *ad libitum?* There is nothing in the Statutes of Colorado which confines the organization of corporations to citizens of the State, or of the United States. In practice they are organized at the pleasure of those who see fit to take advantage of its laws. Will it be said in the face of the deliberate change made in the first section of the act of 1872 by the Senate of the United States, whose purpose was, among other things, certainly to deny to aliens the rights of citizens, and thereby add another inducement to the naturalization of

foreigners, that the class of persons so excluded can, by the exercise of a little circumlocution, make the exclusion so created not only a dead letter but a farce? We think not.

It will not do to reply to this query, that the State of Colorado has the right to regulate the matter, in that it may by law, forbid the organization of a corporation by aliens. This would effect nothing. For the same class of persons may go into this adjoining State of Kansas, or the adjoining Territory of Wyoming, and there organize the necessary association, and then returning to this State, they may as a corporate citizen of the United States, exercise all the powers and prerogatives to which they would have been entitled had no such law existed within our borders. Nor will it do to reply to this, in turn, that each State and Territory has the same power, because there is no authority high enough to compel them to exercise it if they have, and the exercise of it by thirty-seven of the thirty-eight States would, of itself, be an inducement for the thirty-eighth to continue the present system.

So that whether we view the act of 1872 from a legal or a practical standpoint, the irresistible conclusion must be that the Josephine Mining & Prospecting Company, in attempting to locate the Vallejo mining claim, assumed and exercised a power not warranted by the law either of the State of Colorado or of the United States, and such act, being *ultra vires*, is therefore void.

VI.

But counsel for plaintiff in error insists that the policy of our own State has been in favor of the construction for which he contends, and calls special attention to Section 84, Chapter 19 of the General Statutes concerning corporations, which provides: "Any ore reducing, mining or tunneling company, organized under the provisions of this act, shall have the power to acquire by purchase or otherwise, mining property, and work, mine, tunnel and develope the same, etc." This section, it is insisted, "clearly gives the right to Colorado corporations to acquire public mineral lands by appropriation; that is by location. A corporation does not take by descent. The word purchase includes all other common law modes of acquiring title; hence, acquiring *otherwise* must mean under the law, by appropriation." If a corporation does not take by descent, then the word "otherwise" means that it takes by purchase, as fully as does the word "purchase" itself, and counsel simply argues in a circle. We contend that there is nothing in this section which gives or recognizes the right to acquire by location any property whatever; because, first, if it did it would be in conflict with the acts of Congress upon the same subject, and therefore, void; and second, the argument contended for by counsel would authorize a Colorado corporation to locate a quarter section of coal land, as well as

mining claims under the act of 1872. We have seen that the statute referring to the acquisition of title to coal land, together with the circular of the Land Department, based thereon, expressly excludes corporations from the right of locations. A coal mining or tunneling company is as much a mining company as is one devoted to the developement of gold, silver, lead or iron mines. There is no separate chapter or section of the State Statutes devoted to coal mining companies as contradistinguished from other mining companies, and hence counsel for plaintiff in error practically contends, that although Congress has declared "that any person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such shall," etc., "have the right to enter any quantity of vacant coal lands," etc., "not otherwise appropriated" a corporation, created under the laws of this State, and having the power to acquire mining property by purchase or otherwise, can go to the proper land office and enter a quarter section of coal land.

One of the best tests of the correctness of a given construction is to ascertain the consequences which would flow from it. In this case, it is plainly seen to be a subversion of some of the statutes of the United States Government upon the same subject.

The word "otherwise" as used in the statute, was doubtless inserted out of abundant caution, to

prevent complications which might arise through the efforts of interested parties to construe the word "purchase" in its purely technical sense. If the word "otherwise" were given the broad meaning which the term naturally has, it would include descent, and since a corporation cannot take in that manner, the term must be, to some extent, restricted; and since we find that under the Statutes of the United States it cannot take by location, it must be yet further restricted, and in consequence it becomes practically synonymous with "purchase" as this term in modern parlance is practically understood.

When we turn to the statutes of our State, on the subject of mining, as contradistinguished from that of corporations, we find ample corroboration of this view. Sections 2385 to 2415, inclusive, of the General Statutes of 1883, are devoted to that subject, and every expression therein contained concerning the discovery and location of mining claims favors the view that locations must be made by individuals. By section 2409, the right is given to a locator of any mining claim, or his assigns, to relocate his claim for the purpose of curing errors. It is under this statute that relocations have been made by corporations which were the assigns of locators, for the purpose of curing errors of description, etc., in the original certificate of location, and it is such locations which doubtless confused the

registers and receivers of the land offices in the State, and to which they referred in their affidavits accompanying the application to advance this case. In the case of Murphy vs. the Lawrence Mining Company, in the United States Circuit Court, tried before Judge Hallett in 1881, in this District, but not reported, the right of a corporation, as the assign of a locator, to re-locate a claim was especially recognized, and no one can doubt but that such a right is included in the authority given by section 2409. Without that section it is extremely doubtful if a re-location of a mining claim could be made by a corporation within the State of Colorado.

Counsel insists "that because the certainty of a rule is of more importance than the reason of it," and because "the Land Department of the United States has established a rule on this subject, therefore, for the protection of vested property rights, this Court cannot well, without departing from the established doctrine, recognize the principle contended for by defendant in error." We do not dispute the reason of the rule itself, or the authority of the many cases cited in support of this proposition by Mr. Butler. The difficulty is, however, that no such rule has ever been recognized or established, and consequently no vested property interests, based upon such rule, can in any wise be injured by a decision upon it. We have already called attention to the fact that there is absolutely no evidence of such con-

struction presented by the records of this case, and it would be as proper for us to accompany this argument with affidavits denying the facts set forth in the application to advance the cause, as it is for the plaintiff in error to refer to such a source for what he claims to be established facts. Whether the General Land Office has questioned the right of a corportion to locate, or join in the location of, a lode or placer mining claim or not makes no difference. The question was probably never raised, and consequently doubtless never occurred to the many subordinates of that department, so busily occupied with the transaction of an ever increasing and constantly multiplying routine of duties. So arduous, indeed, has become the transaction of these duties that it is a matter of wonder that officials of that department ever stop to question anything.

If, as a matter of fact, patents have issued to corporations as original locators of mining claims, which we very much doubt, then, under the many decisions of this Court, of which Smelting Company vs. Kemp, 104, U. S. 636, is a good illustration, no one but the United States can question the integrity of that title. If corporations have been so foolish as to locate claims in their own names, and for which patents have not yet issued, then, if they are in possession, it is perfectly easy for some citizen to make a location thereof in their behalf. If any corporation has purchased a mining claim or claims from

the locators thereof, it cannot in any wise be affected by a decision in this case favorable to defendants in error, and we do not apprehend, this being the case, that this Court will be seriously disturbed by any suggestion as to the effect which a decision may have upon the rights of a class of artificial beings presuming to exercise the rights of absolute citizenship. The only case which counsel can find containing any expression favorable to his view of this question is that of the North Noonday Company vs. The Orient Company, 6 Sawyer, 299. S. C., 1 Federal Reporter, 522. The little that was said upon the subject by the Court in that case was *obiter;* the particular question involved being the right of an alien to locate a mining claim. A location had been made by a number of individuals, one of whom was a foreign born son of an alien, whose father had not been naturalized during his minority. He conveyed his interest to four citizens of the United States, who afterward continued to perform those things required by the statute to preserve the existence and integrity of the claim prior to patent; and these parties, in turn, conveyed to the plaintiff company, which, in the language of the decision, "being a corporation created and existing under the laws of California, was to be deemed a citizen within the meaning of the statute, and as such, competent to *purchase and hold* a mining claim." The right of that company, or of any company, to locate a mining claim was not

in any wise involved in the case. The defendant, the Orient Company, obtained its title in the same manner as did the plaintiff company, and hence the question could not well have arisen. The only proposition of importance here, which the Court decided there, is that which refers to the act of May 10, 1872, concerning citizens. On page 526 the Court says: "In order to acquire any right of location and purchase under this act, a party seeking to acquire such right must either be a citizen of the United States, or must have declared his intention to become such;" and the conclusion, therefore, seems to us to be irresistible, that natural persons, and they only, have been given the right in the first instance to discover and locate mining claims upon the public domain.

Summarizing the reasons for this conclusion, we may say that it rests, first, upon the general policy of the Government concerning the disposition of its public lands; second, upon its policy and that of the miners with reference to mineral lands anterior to May 10, 1872; third, upon the consideration of the law itself; fourth, upon the fact that corporations are never recognized as citizens, save for certain necessary purposes, chiefly those of jurisdiction; fifth, upon the serious practical consequences which would flow from the recognition of such right; and sixth, upon the expressions upon the subject which have fallen from those

tribunals before which the question has been incidentally presented.

We respectfully submit that the judgment of the Court below should be affirmed.

C. S. THOMAS,
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ADDENDA.

For the convenience of the Court we have added to this brief the decision of Judge Hallett on the demurrer in the Court below, together with the letter of Senator Stewart to Senator Ramsey referred to in argument and found in 3 Wallace, p. 777.

McKINLEY vs. WHEELER ET AL.

In the Circuit Court of the United States, January 4, 1886.

HALLETT, J., orally:

An action is brought by Alexander B. McKinley against Jerome B. Wheeler and Clinton Markell to recover one-half interest in the Vallejo lode mining claim. The plaintiff alleges that this lode was located by the Josephine Mining and Prospecting Company, James W. McGee and Charles Miller, and that he has acquired the interest of the Josephine Mining Company through several other persons. The claim is based upon the location made by a corporation. There is a demurrer to the complaint in which it is objected that a mining claim cannot be located wholly or in part by a corporation, and therefore the plaintiff can have no interest in the property acquired from a corporation.

The sections of the Revised Statutes relating to mining claims are snbstantially the same as enacted in the act of 1872, found at page 91, Vol. 17 of the statutes at large. In the first section of that statute it is declared that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase and the land in which they are found to occupation and purchase by citi-

zens of the United States, or those who have declared their intention to become such under the regulations prescribed by law and according to the local customs and rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. This section defines the persons who may make a location of a mining claim as citizens, or those who have declared their intention to become such. There is, however, in subsequent sections of the same act some reference to corporations, as in the sixth section, which relates to proceedings to obtain patent. It is said that any person, association or corporation authorized to locate a claim under this act, having claimed and located a piece of land for such purpose, who has or have complied with the terms of the act, and so on, defining a step to be taken towards obtaining a patent; and in the last clause of the seventh section, "said proof of citizenship under this act, or the acts of June 26, 1866, or of July 9, 1870, in case of an individual may consist of his own affidavit thereof, and in case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in case of a corporation organized under the laws of the United States, or of any State or Territory of the United States, the filing of a certified copy of their charter or certificate of incorporation." And in the eleventh section, "that where the same person, association or corporation is in possession of a placer claim and also a vein or lode included within the boundaries thereof, application shall be made for patent to the placer claim, with the statement that it includes such vein or lode." Then defining the steps to be taken in that case, where the placer claim has also within its limits a lode claim. It is contended on behalf of the plaintiff that by these references to a corporation in subsequent sections of the statute, the act is made applicable to such bodies in all its

terms, and the act is to be read as if in the first section, which defines persons who are qualified to make a location, corporations had been expressly mentioned.

If this act were the first which had been passed by Congress upon the subject, there would be very great difficulty in reaching a conclusion upon the question, because it is to be observed it is not declared anywhere in the statute that corporations shall be competent and qualified to make a location. In the argument at the bar, some effort was made to determine whether a corporation can be a citizen of the United States within the meaning of this act, or of any act of Congress, but that is a question that is hardly open to discussion. The Supreme Court of the United States, in a great many cases in which the question has been considered with reference to the competency of corporations to sue or to be sued in the Federal Courts have discussed the question and have always declared that a corporation was not a citizen and cannot be regarded as one in any view that may be taken of it; and that is obviously true. It is impossible to say that an artificial person, created by law only, can be such a person as would have the attributes of citizenship. They have said that in suits by and against corporations, the presumption will be indulged that the persons who constitute or make up the corporation are citizens of the State in which it may be established or created.

There was some doubt expressed upon this question for some time, but at last the Supreme Court reached the conclusion that this should be a matter of conclusive presumption; that is, it should not be subject to contradiction, but it was always expressly stated whenever the question arose that a corporation was not a citizen of the United States within the meaning of the Constitution, and I suppose also of any law that may be passed relating to citizens; so that it is hardly possible to bring corporations within the

language of the first section, referring to citizens of the United States and those who have declared their intention to become such, and the only question is, whether by the reference to corporations in other sections following the first, the first section is to be taken as if it read that mineral lands may be occupied and may be purchased by citizens of the United States and those who have declared their intention to become such, or by corporations created by acts of the Legislature, or by the Congress of the United States. And upon that section there would be some difficulty if this were the first act passed by Congress upon that subject, but it is not the first. In 1865 Mr. Stewart's famous act, which must have been written by himself without the correction of any clerk, as was usually the case with the speeches he made in the Senate was passed. It was enacted by that act (February 22, 1865,) that no possessory action between individuals in any of the Courts of the United States for the recovery of any mining title, or for damages to any such title, would be affected by the fact that the paramount title to such land is in the United States, but each case shall be adjudged by the law of possession. That was taken to be whether it was in fact a declaration of Congress that in controversies between owners of claims, the circumstance that the title was in the Government should not affect the question in issue between the parties; and without the aid of any such statute, and in a case which arose prior to the enactment of this statute, the case of Sparrow vs. Strong, reported in 3d Wallace, the Supreme Court reached the same conclusion. After referring to the fact that in the Territory of Nevada claims were recognized as property rights under the rules and regulations of the mining districts, the Court says: "We cannot shut our eyes to the public history which informs us that under this legislation, and not only without interference by the National Government, but under its implied sanction, vast mining interests

have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country."

The question in this case was whether the writ of error should be dismissed as relating to a question arising upon a mining claim, the title to which was in the Government of the United States. The Court declined to dismiss the writ of error, and subsequently considered the case on its merits.

In this act of 1865, Congress clearly and very distinctly recognized the rules and regulations of miners, the customs under which the locations were made as being valid and effectual in respect to such rights; and in 1866 the act was passed which declared this matter very fully and distinctly. The first section of the act was, "that any mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as may be declared by the local rules and regulations of miners, not in conflict with the laws of the United States." If this section be compared with the first section of the act of 1872, it will be seen that it varies very little from that section. The act of 1872 declared that these lands, describing them, however, as mineral deposits in the lands of the United States, should be free and open to exploration and purchase, the words "and purchase" being added, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such. There is no difference in describing those who are qualified to occupy and purchase in the two acts, or in the language used with respect to the local customs and rules of miners in the several mining districts. In that respect the acts are the same.

In 1870, July 9, a number of sections were added to this act of 1866, in which the act was made applicable to placer claims, giving the right to proceed under the act of 1866 in respect to placer claims and making some regulations in respect to those claims. In neither one of these acts—in the act of 1865, in that of 1866, or in the act of 1870—is there any reference to corporations. In all of them reference is made to local customs and rules of miners in the several mining districts. In the act of 1872 the first reference to corporations is in that section which relates to the proceedings to obtain a patent from the United States. There is no reference in any preceding section.

Now these considerations are of considerable weight upon this question. In the first place, it was, I think I can say with some confidence, never known in any mining district that a corporation could be allowed to make a location of a mining claim. Within my knowledge in this territory and State of Colorado, no such instance can be found. If there is any such I never heard of it, and I think it may be true that in other mining countries of the United States the same rule has prevailed. While after locations have been made and claims fully established, the corporations have acquired title to them and carried on mining operations in this country and elsewhere, the location of a mining claim by a corporation has not been known; and under these circumstances, the first acts containing no reference to a corporation, and referring distinctly to the rules and regulations of mining districts, which Congress was anxious to adopt and preserve, as far as they should be consistent with statute law. I think it is not to be said that a corporation may make a mining location unless the language of the act of 1872 clearly requires it,and as this, the first reference, as I have said, to corporations, is in those provisions of the act which relate to the acquisition of title, I think it may be readily understood that the reference to that was in con-

formity with the rules and regulations of miners, which allowed corporations to acquire titles after locations had been made, and not before; which recognized their right to organize for the purpose of carrying on mines after locations had been made, but not in respect to the location of them.

There is another consideration: In the act of 1866 and in that of 1872, the miners of each district are authorized to make rules and regulations not in conflict with the laws of the United States or with the laws of the State or Territory in which the district is situated, governing the location, the manner required, and the amount necessary, subject to the following requirements; that is, subject to the limitations contained in this act. It is clear enough that persons who were to make these regulations were those who were qualified to make locations, and I think it would be very absurd to suppose that a corporation could appear in any such meeting and act as a corporation in the making of rules and regulations for a mining district. This is a matter which hardly admits of discussion. We cannot suppose that any corporation would be authorized to send an agent into any such meeting for the purpose of making regulations. They cannot have anything to do with that subject, and the circumstance that Congress has declared, ratified the mode of proceeding of miners in making their rules and regulations would indicate that Congress also recognized the fact locations could only be made by natural persons, citizens of the United States, or those who intended to become citizens, and not by the agents of corporations.

For these reasons I am of the opinion that the location made by the Josephine Mining Company is invalid, and the title acquired by the plaintiff is also invalid.

Some discussion was had at the bar on the question as to whether title could be acquired by a corporation incom-

petent to hold and held by the corporation until office found, citing those cases in which it has been held that upon conveyance to an alien corporation, or one who is not authorized to hold lands, the title shall pass and remain in the corporation until declared invalid by the State. There is no question as to those rules, but they are not at all applicable to a case of this kind. If the Government should make title to a corporation, those rules would apply; but this is a question as to the person who may be entitled under the act of Congress to obtain title from the Government. Upon that subject it must be said that a corporation is in the same situation as an alien, that the title cannot be acquired under this act of Congress with reference to an alien. It has been held by the Supreme Court of California that no title can pass under this act. That case is Lee Dune against Tash, in the 8th volume of the West Coast Reporter, 201. I regard the rule applying to corporations the same as it is in respect to aliens.

The demurrer to the complaint will be sustained.

Letter of Senator Stewart to Senator Ramsey.

Upon the discovery of gold in California in 1848, a large emigration of young men immediately rushed to that modern Ophir. These people, numbering in a few months hundreds of thousands, on arriving at their future home found no laws governing the possession and occupation of mines but the common law of right which Americans alone are educated to administer. They were forced, by the very necessity of the case to make laws for themselves. The reason and justice of the laws they formed challenge the admiration of all who investigate them. Each mining district, in an area extending over not less than 50,000 square miles, formed its own rules and adopted its own customs. The similarity of these rules and customs throughout the entire mining region was so great as to attain all the beneficial results of well digested general laws. These regulations were thoroughly democratic in their character, guarding against every form of monopoly, and requiring continued work and occupation in good faith to constitute a valid possession.

After the admission of California as a State, in September, 1850, Mr. Fremont, then Senator from that State, introduced a bill, the purpose of which was to establish police regulations in the mines. It imposed a small tax upon the miners to defray the expenses of the system. Many Senators, when the bill came up for discussion, expressed the opinion the mines ought to be sold, or some means devised by which a direct revenue might be obtained from that source. Various amendments were offered to effect these purposes. But Mr. Benton took a leading part in the discussion and contended throughout that good

policy required that the mines should remain free and open for exploration and development. Mr. Seward sustained Mr. Benton.

The arguments of Senators in favor of free mining finally prevailed, and all amendments looking to sale or direct revenue were voted down, and the bill finally passed the Senate without material amendment, in its original form, but failed in the House for want of time to consider it. Before the meeting of the next Congress the fact became known that the miners themselves had adopted local rules for their own government, which rendered action on the part of Congress unnecessary. And from that time to the present, non-action has been the policy of the Government with one single exception. The solemn declaration just mentioned, however, on the part of the Senate, in favor of a just and liberal policy to the miners, was hailed by them as a practical recognition of their possessory rights, and greatly encourged and stimulated mining enterprise, and laid the foundation for a system of local government now in full force over a vast region of country inhabited by nearly a million men.

The Legislature of California, at their following session, in 1851, had under consideration the subject of legislating for the mines, and after full and careful investigation, wisely concluded to declare that the rules and regulations of the miners themselves might be offered in evidence in all controversies respecting mining claims, and when not in conflict with the constitution or laws of the State or of the United States, should govern the descision of the action. A series of wise judicial decisions moulded these regulations and customs into a comprehensive system of *Common Law*, embracing not only mining law (properly speaking), but also regulating the use of water for mining purposes. The same system has spread over all the interior States and Territories where mines have been found, as far east as the Mis-

souri river. The miner's law is a part of the miner's nature. He made it and he loves it, trusts it and obeys it He has given the toil of his life to discover wealth, which, when found, is protected by no higher law than that enacted by himself, under the implied sanction of a just and generous Government. Miners, as a community, devote three-fourths of their aggregate labor to exploration, and consequently are and ever will remain poor, while individuals amass large fortunes, and the treasury of the world is augmented and replenished.

Persons who have not given this subject attention can hardly realize the wonderful results of this system of free mining. The incentive to the pioneer held out by the reward of a gold or silver mine if he can find one, is magical upon the sanguine temperament of the prospector. For near a quarter of a century a race of men, constituting a majority by far of all of the miners of the West, patient of toil, hopeful of success, deprived of the associations of home and family, have devoted themselves with untiring energy to sinking deep shafts, running tunnels thousands of feet in solid granite, traversing deserts, climbing mountains, and enduring every conceivable hardship and privation, exploring for mines, all founded upon the idea that no change would be made in this system that would deprive them of their hard earned treasure. Some of these have found valuable mines and a sure prospect for wealth and comfort when the appliances of capital and machinery shall be brought to their aid. Others have received no compensation but anticipation—no reward but hope.

While these people have done but little for themselves they have done valuable service for this Government. They have enhanced the value of the property of the nation near 100 per cent.; have converted that vast unknown region extending from British Columbia on the north to Mexico on the south, and from the eastern slope of the

Rocky Mountains to the western decline of the Sierra Nevada, into the great gold and silver fields of the United States surpassing in richness and extent the mines of any other nation on the globe. I assert that no one familiar with the subject will question the fact that the sand plains, alkaline deserts and dreary mountains of rock and sage brush of the great interior would have been as worthless to-day as when they were marked by geographers as the great American desert, but for this system of free mining, fostered by our neglect and matured and perfected by our generous inaction. No miner has ever doubted the continued good faith of the Government, but has put his trust in its justice and liberality, traversing mountain and desert as incessantly and as hopeful as the farmer of the West has ploughed his field. What he now occupies he has discovered and added to the wealth of the nation.

The good faith of the Government (promised, as it were, by the action of the Senate sixteen years ago), not only inspired enterprise and led to discoveries, the magnitude and importance of which cannot be over estimated, but in the time of the severest trials of the Union, no people were more loyal than the miners. They lost no opportunity to enlist in your armies or contribute to the support of the Government. Their liberal donations to the sanitary fund was but a slight manifestation of their deep love of the Union and sympathy for its suffering heroes. The little town in which I reside contributed in gold coin over $112,000, being at the time about $30 to each voting inhabitant, and a like liberality was displayed by the whole coast.

The people are truly grateful to a generous Government, and time seems to have strengthened the regard they feel for their native land and their early homes. But they will look with jealous eyes upon every proposition for the sale of the mines which they have discovered and made valuable. Any public man who advocates it, with whatever

motive, is liable to be condemned and discarded as an unfaithful servant. The reason for this is obvious. It is their all, secured through long years of incessant toil and privation, and they associate any sale with a sale at auction, where capital is to compete with poverty; fraud and intrigue with truth and honesty. It is not that they do not desire a fee simple title, for this they would prize above all else; but most of them are poor and unable to purchase in competition with capitalists and speculators, which the adoption of any plan heretofore proposed would compel them to do; and for these reasons, the opposition to the sale of the mineral lands has been unanimous in the mining States and Territories.

To extend the pre-emption system—applicable to agricultural lands—to mines is absurd and impossible. Nature does not deposit the precious metals in rectangular forms, descending between perpendicular lines into the earth, but in veins or lodes, varying from one foot to three hundred feet in width, dipping from a perpendicular from one to eighty degrees, and coursing through mountains and ravines at nearly every point of the compass. In exploring for vein mines, it is a vein or lode that is discovered, not a quarter section of land marked by surveyed boundaries. In working a vein, more or less land is required, depending upon its size, course, dip, and a great variety of other circumstances, not possible to provide for in passing general laws. Sometimes these veins are found in groups, within a few feet of each other, and dipping into the earth at an angle of from thirty to fifty degrees as at Freiburg, in Saxony, or Austin, in Nevada. In such a case a person buying a single acre in rectangular form would have several mines at the surface and none at five hundred or a thousand feet in depth. With such a division of a mine, one owning it at the surface, another at a greater depth, neither would be justified in expending money in costly

machinery, deep shafts, and long tunnels for the working of the same. Nor will it do to sell the lands in advance of discovery, for this would stop explorations, and practically limit our mining wealth to the mines already found, for no one would prospect with much energy upon the land of another, and land speculators never find mines. The mineral lands must remain open and free to exploration and development, and while this policy is pursued, our mineral resources are inexhaustible. There is room enough for every prospector who wishes to try his luck in hunting for new mines for a thousand years of exploration, and yet there will be plenty of mines undiscovered. It would be a national calamity to adopt any system that would close that region to the prospector.

The question then presents itself, how shall the Government give title, so important for permanent prosperity, and avoid these intolerable evils? I answer, there is but one mode, and that is to assure the title to those who now or hereafter may occupy according to local rules, suited to the character of the mines and the circumstances of each mining district. In the increasing agitation of the subject by the introduction into Congress of bills which miners regard as a system of confiscation, and which tend to destroy all confidence in mining titles, we now need statutes which shall continue the system of free mining and hold the mineral lands open to exploration and occupation, subject to legislation by Congress and local rules; something which recognizes the obligation of the Government to respect private rights which have grown up under its tacit consent and approval, and which shall be in harmony with the legislation of 1865, protecting possessory rights, irrespective of any paramount interest of the United States. The system will be in harmony with the rules of property as understood by a million men, with the legislation of nine States and Territories, with a course of judicial decisions extending over near a quarter of a century, and finally ratified and confirmed by the *Supreme Court* of the *United States;* in harmony, in short, with justice and good policy.